No. 00-878-CFX Title: Richard L. Mathias, et al., Petitioners
v.
WorldCom Technologies, Inc., et al.

Docketed: November 30, 2000 Court: United States Court of Appeals for the Seventh Circuit

Vide:

Entry	Date	Proceedings and Orders
	Oct 30 2000	Application (00A374) to extend the time to file a petition for a writ of certiorari from November 7, 2000 to November 28, 2000, submitted to Justice Stevens.
	Nov 3 2000	Application (00A374) granted by Justice Stevens extending the time to file until November 28, 2000.
	Nov 28 2000	Petition for writ of certiorari filed. (Response due January 16, 2001)
	Dec 11 2000	Order extending time to file response to petition until January 16, 2001.
	Dec 11 2000	This extension of time is granted for all respondents.
	Jan 16 2001	Brief of respondents Worldcom Technologies, Inc., et al. in opposition filed. VIDED.
	Jan 16 2001	Waiver of right of respondents AT&T Communications of Illinois, Inc., et al. to respond filed.
	Jan 16 2001	Brief of respondent Illinois Bell Telephone Company in opposition filed.
	Jan 31 2001	DISTRIBUTED for Conference of February 16, 2001
	Feb 15 2001	Supplemental brief of respondents WorldCom Technologies, Inc., et al. filed. VIDED.
	Feb 20 2001	REDISTRIBUTED for Conference of February 23, 2001
	Feb 26 2001	REDISTRIBUTED for Conference of March 2, 2001
	Mar 5 2001	Petition GRANTED. limited to the following questions: 1. Whether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a "determination under section 252" and thus is reviewable in federal court under 47 U.S.C. Sec. 252(e)(6). 2. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity. 3. Whetheran official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the Ex parte Young doctrine. Justice O'Connor OUT. SET FOR ARGUMENT December 5, 2001.
		**********
	Apr 5 2001	Order extending time to file petitioners' brief on the merits to and including May 29, 2001. Order extending time to file respondents' briefs on the merits to and including July 12, 2001. A reply brief, if any, is due

Entry	Date	Proceedings and Orders
		on or before August 13, 2001.
	Apr 19 2001	Joint appendix filed.
	May 29 2001	Brief of petitioners Richard Mathias, et al. filed.
	May 29 2001	Brief amici curiae of National Assn. of Regulatory Utility Commissioners, et al. filed.
	May 29 2001	Brief amici curiae of Council of State Governments, et al. filed.
	May 29 2001	Brief amicus curiae of Coalition for Local Sovereignty filed.
	May 29 2001	Brief amicus curiae of Pennsylvania Public Utility Commission filed.
	May 29 2001	Brief amici curiae of New Jersey, et al. filed.
	Jun 13 2001	Motion of respondents Worldcom Technologies, Inc., et al., for additional time for oral argument and for divided argument filed.
	Jul 3 2001	Order further extending time to file respondents' briefs on the merits to and including September 10, 2001.
	Jul 17 2001	Motion of the United States to intervene filed.
	Jul 26 2001	Responses requested of the parties to the motion of the United States to intervene to be filed with the Clerk and served upon counsel on or before noon,August 6, 2001. Rule 29.2 does not apply.
	Aug 3 2001	Response of Illinois Bell Telephone Co. to motion to intervene filed. (NP)
	Aug 6 2001	Response of respondents WorldCom Technologies, Inc., et al. to above motion filed.
	Aug 6 2001	Response of AT&T Communications of Illinois, Inc, et al.in support of the motion above filed.
	Aug 6 2001	Response of petitioners Richard L. Mathias, et al. to above motion filed.
	Aug 8 2001	Motion of the United States to intervene GRANTED. Justice O'Connor OUT.
	Aug 23 2001	Application (01A163) to extend the time to file a reply brief from October 10, 2001 to November 2, 2001, submitted to Justice Stevens.
	Aug 27 2001	Application (01A163) granted by Justice Stevens extending the time to file until November 2, 2001.
	Sep 4 2001	Brief amicus curiae of Sprint Corporation filed.
	Sep 10 2001	Brief amicus curiae of NOW Legal Defense and Education Fund filed.
	Sep 10 2001	Brief of respondents AT&T Communications of Ill.,Inc. and Teleport Communications filed.
	Sep 10 2001	Brief of respondents WorldCom Technologies, Inc., et al. filed.
	Sep 10 2001	Brief amici curiae of BellSouth, et al. filed.
	Sep 10 2001	Brief of respondent United States filed.
	Sep 10 2001	Brief of respondent Illinois Bell Telephone Company filed.
	Sep 25 2001	CIRCULATED.
	Sep 25 2001	Motion of the United States for divided argument filed.
	Sep 27 2001	Respose to the motion of the United States for divided argument from counsel for respondent Illinois Bell Telephone Company received and DISTRIBUTED.
	Oct 2 2001	Response to motion of the Solicitor General for divided argument by counsel for WorldCom Technologies, Inc., et al., filed.
	Oct 5 2001	Response of Illinois Bell Telephone Company to the motion for divided and extended argument, and to the motion of the United States for divided argument.
	Oct 29 2001	Motion of the United States for divided argument GRANTED. Justice O'Connor OUT.
	Oct 29 2001	Motion of respondents Worldcom Technologies, Inc., et al., for additional time for oral argument and for divided argument DENIED. Justice O'Connor OUT.
	Nov 2 2001	Reply brief of petitioners Richard L. Mathias, et al. filed.
	Nov 30 2001	Record filed.
	Dec 5 2001	ARGUED.
	Dec 6 2001	Motion of respondent Illinois Bell Telephone Co. for leave to file a supplemental brief after argument filed.
	Dec 17 2001	Response of petitioners to above motion and motion for leave to file a supplemental brief, after argument, filed.
	Dec 17 2001	Motion of petitioners for leave to file a supplemental brief after argument filed.

No. 00-878-CFX

Supreme Court, U.S.
FILED
00-878 NOV 28 2000

No.

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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88pp

QUESTIONS PRESENTED

I. Whether the court of appeals erred in holding that section 252(e)(6) of the Telecommunications Act of 1996 gives federal district courts jurisdiction to review orders of state public service commissions that resolve contract disputes under state law, where the express language of section 252(e)(6) of the Act limits federal review to determinations made by state commissions under section 252, the Act leaves supervision of the agreements to the states, and the Act prohibits implied preemption of state law.

II. Whether the court of appeals erred in holding that a state public service commission constructively waived the state's constitutional sovereign immunity by adjudicating complaints brought under state law calling for the interpretation and enforcement of privately negotiated provisions in contracts entered into pursuant to the Telecommunications Act, when after *College Savings* waivers of immunity must be deliberate, express waivers made by the state itself.

III. Whether the court of appeals erred in finding jurisdiction over the ICC, through the Commissioners, without determining whether the requirements for application of the *Ex parte Young* exception were satisfied, where Congress did not authorize suits against state commissioners under the Act, where the conduct complained of was not alleged to violate the Constitution, and where the substance of the relief sought was reversal of the ICC's order.

PARTIES TO THE PROCEEDING

The petitioners are Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, in their official capacities as Commissioners of the Illinois Commerce Commission.

The respondents are Illinois Bell Telephone Company d/b/a Ameritech Illinois, WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corp., MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corp.

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The Commissioners of the Illinois Commerce Commission (collectively "Commissioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. This petition for certiorari seeks review of the court's decision holding that section 252(e)(6) of the Telecommunications Act of 1996 gives federal district courts jurisdiction to review every state commission action concerning interconnection agreements. It also seeks review of the court's holding that the Illinois Commerce Commission ("ICC") constructively waived Illinois' constitutional sovereign immunity by resolving complaints brought under Illinois law calling for the interpretation and enforcement of interconnection agreements. Further, it seeks review of the court's holding finding jurisdiction over the ICC, through the Commissioners, without determining whether the requirements for application of the *Ex parte Young* exception were satisfied.

OPINIONS BELOW

The opinion of the Court Appeals for the Seventh Circuit in *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.* is reported at 179 F.3d 566 and is reprinted in the Appendix at pages 6a-22a. The court of appeal's order of August 19, 2000, amending its opinion is unreported and is reprinted in the Appendix at pages 3a-5a. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is unreported and is reprinted in the Appendix at pages 23a-35a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals in *WorldCom* was entered on June 18, 1999. The court of appeals denied the

Commissioners' petition for rehearing on August 9, 2000. On November 3, 2000, Justice Stevens granted the Commissioners a 21-day extension of time for filing a petition for a writ of certiorari through November 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

1. The Supremacy Clause, U.S. art. VI, cl. 2 (Pet. App. 36a).
2. U.S. Const amend. XI (Pet. App. 36a).

STATUTES

1. Section 252 of the Telecommunications Act of 1996 (Pet. App. 36a-44a).
2. Section 601 of the Telecommunications Act of 1996 (Pet. App. 45a).
3. Section 5/13-514 of the Illinois Public Utilities Act (Pet. App. 46a-47a).

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the ICC. The ICC is an agency of the State of Illinois, and it supervises and regulates telecommunications carriers in Illinois. As part of its responsibilities, the ICC administers and enforces the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (1993). ICC orders or decisions are subject to

judicial review in the Illinois Appellate Court. *Id.* § 5/10-201.

The case began at the ICC when several competing telecommunications carriers brought complaints alleging breaches of their interconnection agreements with Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois") and violations of Illinois law. The ICC resolved those complaints in favor of the competing carriers, and Ameritech Illinois sought review of the order pursuant to section 252(e)(6) of the Telecommunications Act of 1996.

A. Telecommunications Act of 1996

On February 8, 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("1996 Act" or "Act"), which amended the Communications Act of 1934. A keystone of the Act is the introduction of competition into local telephone service markets. The Act imposes general duties on all telecommunications carriers and further obligations on all local exchange carriers ("LECs"). 47 U.S.C. § 251(a), (b). Recognizing that new entrants to the local telephone market would not be able rapidly and efficiently to duplicate the facilities developed over time by incumbent LECs, Congress imposed additional obligations on incumbent LECs like Ameritech Illinois to, among other things, allow new entrants to "interconnect" with their networks, gain unbundled access to discrete elements of their networks, and purchase their telecommunications services for resale at wholesale prices. *See id.* § 251(c). The means of obtaining interconnection, unbundled access, and resale are through

agreements negotiated in accordance with section 252 of the Act.

B. Section 252

Section 252 of the Act is titled "Procedures For Negotiation, Arbitration, And Approval Of Agreements." As its title suggests, section 252 establishes procedures for negotiating, arbitrating, and approving interconnection agreements between incumbent LECs and requesting carriers. Section 252 sets forth a four-part structure for accomplishing this task and implementing the Act.

First, Congress chose to rely in the first instance on voluntary negotiations between incumbent LECs and requesting carriers. If they reach a voluntary agreement, section 252(a)(1) relieves them of the substantive requirements of section 251(b) and (c).

Second, if private carrier-to-carrier negotiations prove unsuccessful, Congress provided for compulsory arbitration of any open issues to reach an agreement. Section 252(b) allows any party to the negotiation, during the period from the 135th to the 160th day from the initial request for negotiation, to petition a state commission to arbitrate any open issues. The state commission must resolve all unresolved issues raised by the arbitration petition and any response within nine months from the time the incumbent LEC receives a request for interconnection, services, or network elements under section 251. 47 U.S.C. § 252(b)(4)(A), (C).

Third, Congress required that all interconnection agreements be submitted to a state commission for approval

before becoming effective. *Id.* § 252(e)(1). A state commission may only reject an agreement (or parts thereof) adopted by negotiation if it finds that the agreement discriminates against a carrier not a party to the agreement or if it is not in the public interest. *Id.* § 252(e)(2)(A). An agreement adopted by arbitration (or parts thereof) may be rejected if it fails to comply with section 251, regulations prescribed by the Federal Communications Commission ("FCC") pursuant to section 251, or the pricing standards in section 252(d). *Id.* § 252(e)(2)(B). Once a final agreement is submitted, a state commission must act on it within ninety days if it is a negotiated agreement (or negotiated portion of an agreement), or thirty days if it is an arbitrated agreement (or arbitrated portion of an agreement). If it does not, the agreement is deemed to be approved. *Id.* § 252(e)(4). Once the agreement is approved, it must be filed with the state commission. *Id.* § 252(h).

Fourth, Congress provided a means for judicial review of a state commission's determinations made under section 252. 47 U.S.C. § 252(e)(6).

C. The Interconnection Agreements

In 1996 and 1997, Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), Focal Communications Corporation of Illinois ("Focal"), AT&T Communications of Illinois, Inc. ("AT&T"), and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (jointly "MCI") (collectively "Competitive Carriers") executed interconnection agreements with Ameritech Illinois and submitted those agreements to the ICC in accordance with

section 252(e)(1) of the Act. The TCG, WorldCom, and Focal agreements are privately negotiated agreements. The MCI and AT&T agreements contain privately negotiated portions and arbitrated portions. None of the arbitrated provisions in those agreements is involved in this case. The reciprocal compensation provisions in each agreement were privately negotiated by the respective carriers. Pursuant to section 252(e)(2), the ICC approved all of the interconnection agreements.

D. Proceedings at the Illinois Commerce Commission

In the fall of 1997, after performing under their agreements for some time, TCG, WorldCom, and MCI filed complaints against Ameritech Illinois. In their complaints, each carrier alleged that Ameritech Illinois breached the terms of its respective ICC-approved interconnection agreement, violated prior ICC orders, and violated various sections of the Illinois Public Utilities Act ("IPUA"), 220 ILCS 5/1-101 *et seq.* (1993). *See* Pet. App. 10a. For example, TCG complained that Ameritech Illinois refused to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Internet Service Providers ("ISPs") on TCG's network in violation of Section 5.6.1 of its interconnection agreement with Ameritech Illinois. TCG requested that the ICC find and declare that i) such calls are local calls subject to reciprocal compensation under its interconnection agreement, ii) Ameritech Illinois is obligated to pay TCG for past due amounts with interest, and iii) Ameritech Illinois should be reprimanded for anticompetitive and unilateral withholding of monies owed to TCG. WorldCom and MCI each requested similar relief. The ICC consolidated the three

complaints and granted petitions to intervene filed by AT&T and Focal.

On March 11, 1998, the ICC entered a 17-page written order granting the consolidated complaints, finding that the disputed calls to ISPs were calls subject to reciprocal compensation according to the terms of the parties' interconnection agreements. ("March 11 Order" or "Order"). The ICC found that Ameritech Illinois' conduct in stopping its reciprocal compensation payments to the complainants had violated its interconnection agreements. Accordingly, the ICC ordered Ameritech Illinois to compensate the complainants for all past due reciprocal compensation amounts and ordered Ameritech and the complainants to resume making payments in accordance with their agreements. *See* Pet. App. 10a.

E. The Federal Court Proceedings Below

Dissatisfied with the outcome, Ameritech Illinois filed a complaint in federal district court seeking review of the ICC's Order pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331.[1] Pet. App. 24a. In its complaint, Ameritech Illinois named the Commissioners — not the ICC — as defendants. The Commissioners immediately moved to dismiss all claims against them arguing, among other things, that the district court lacked subject matter jurisdiction over Ameritech Illinois' complaint under section 252(e)(6) and

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1. It also filed a petition for review of the ICC's Order in the Appellate Court of Illinois for the Third District. The Appellate Court stayed the appeal pending resolution of the proceeding in federal district court.

section 1331 and that the Eleventh Amendment to the U.S. Constitution barred the action. The district court denied the motions, determining that it had exclusive jurisdiction under section 252(e)(6) to review the actions of the ICC in interpreting and enforcing agreements and finding that the Eleventh Amendment was no bar to its review. The district court decided the merits and affirmed the ICC's Order. (Pet. App. 25a).

The Commissioners appealed to the Seventh Circuit. On June 18, 1999, the Seventh Circuit in *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), *amended*, 1999 U.S. App. LEXIS 20635 (Aug. 19, 1999), denied the Commissioners' statutory and sovereign immunity objections and "affirm[ed] the decision of the district court affirming the order of the Illinois Commerce Commission." Pet. App. 22a. In denying the Commissioners' objections, the court relied principally on its earlier decision in *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 183 F.3d 558 (7th Cir. 1999), a case involving review of arbitrated terms of an agreement. The court found the Commissioners' sovereign immunity argument "no longer tenable" after *MCI*, in which the court held that the ICC's participation in the arbitration and approval functions in the Act constituted a constructive waiver of immunity. Pet. App. 12a-13a.

Ignoring the Commissioners' primary argument that in resolving complaints brought under state law the ICC did not make a determination under section 252, the court also found that jurisdiction existed to review the ICC's Order under section 252(e)(6). Once again the court followed *MCI*, in which the court had held that section 252(e)(6) provides for

judicial review of state commission "actions" and that "Congress intended that state commissions be parties to the federal court suits reviewing their actions." Pet. App. 13a-14a. The court held that "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then move to state court if the first suit yields the answer 'no.' " Pet. App. 5a.

On June 23, 1999, this Court issued *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), *Alden v. Maine*, 119 S. Ct. 2240 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), three opinions involving state sovereign immunity. Two days later, the court in *MCI* granted rehearing.[2] The WorldCom court held the Commissioners' petition for rehearing in abeyance pending decision on rehearing in MCI. Pet. App. 4a.

On rehearing in *MCI*, the Seventh Circuit affirmed its earlier decision. *MCI v. Illinois Commerce Comm'n*, 222 F.3d 323 (7th Cir. 2000). The ICC and the Commissioners have filed a petition for certiorari seeking review of the *MCI*

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2. Shortly after the *MCI* court granted rehearing, several appeals were taken from Judge Crabb's decision in *Wisconsin Bell v. Public Service Commission of Wisconsin*, 57 F. Supp.2d 710 (W.D. Wis. 1999), granting the Wisconsin Public Service Commission's and its commissioners' motions to dismiss based on the Eleventh Amendment. The court consolidated the Wisconsin appeals with the *MCI* appeal for purposes of argument and disposition.

decision. Their petition has been assigned Docket No. 00-744. The Wisconsin Public Service Commission and its commissioners have sought similar review. Their petition has been assigned Docket No. 00-653. On August 9, 2000, the *WorldCom* court denied the Commissioners' petition for rehearing and made no changes to its opinion. Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

The 1996 Act is a major piece of federal legislation that "fundamentally restructures local telephone markets" and "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 726, 738 (1999) ("*Iowa Utilities*"). The Act's goals of fostering competition in the local markets and furthering competition in the long-distance market aim to bring lower prices, better quality service and technological innovations to all telephone subscribers. To implement its provisions, the Act enlists the states and the FCC in a cooperative effort. Thus, the issues implicated by the Act are of substantial local and national importance.

Despite the cooperative federal-state effort, the Act does not give federal courts jurisdiction to review every state commission decision concerning interconnection agreements. The Seventh Circuit's construction of section 252(e)(6) radically alters the federal-state balance of power and injects the federal courts into state administrative review schemes. Under the Seventh Circuit's sweeping interpretation, section 252(e)(6) radically shifts judicial review of many state commission actions involving purely local matters from state courts to federal courts and allows every telecommunications carrier with an interconnection

agreement approved by a state commission to seek appellate review of state commission actions in federal court. Congress did not intend the narrow judicial review provision in section 252(e)(6) for review of state commission determinations made in the arbitration and approval process to subject every subsequent state commission decision touching upon interconnection agreements to judicial review in federal district court. The Act reserves the supervision of the performance of interconnection agreements to state commissions and state courts, the traditional regulators and reviewers of local telephone matters.

In addition, the Seventh Circuit held that the Eleventh Amendment stands as no bar to claims against state commissions for review of their decisions made under state law. The importance of constitutional sovereign immunity to the States cannot be doubted. The Seventh Circuit's constructive waiver holding conflicts with this Court's recent decision in *College Savings*. It also conflicts with the Sixth Circuit's view in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). Furthermore, in determining that it could review the ICC's Order through an action against the Commissioners, the Seventh Circuit impermissibly enlarged the narrow, judicially-created *Ex parte Young* exception in derogation of Illinois' constitutional sovereign immunity.

The Seventh Circuit's decision raises substantial statutory and constitutional questions implicating important issues of federalism that this Court should settle. Given the importance of the Act and its substantial impact on the Nation's economy, given the importance of uniform administrative review schemes to the states, and given the

importance of constitutional sovereign immunity to the states, the Court should grant review.

I. Section 252(e)(6) Does Not Give Federal Courts Jurisdiction to Review Every State Commission Action Concerning Interconnection Agreements.

The court of appeals fundamentally misconstrued the Act to allow federal district court review of every state commission action concerning interconnection agreements. In doing so, the court ignored the Act's purpose and structure and the plain language of section 252(e)(6) limiting federal jurisdiction to those state commission determinations made under section 252 (*i.e.*, determinations made in the arbitration and approval process). In addition, in holding that federal jurisdiction under section 252(e)(6) is exclusive when it exists, the court necessarily found, without so much as discussing it, that section 252(e)(6) preempted state judicial review laws in violation of section 601 of the Act. The court's opinion contradicted the plain meaning of the Act, implicitly preempted state judicial review laws in violation of section 601 of the Act, and fundamentally altered the federal-state constitutional balance.

A. Section 252(e)(6) Limits Federal District Court Review to State Commission Determinations Made Under Section 252.

The plain language of section 252(e)(6) limits federal district court review to state commission determinations made *under section 252*. Section 252(e)(6) provides in relevant part: "In any case in which a State commission makes a determination under this section, any party

aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." Pet. App. 42a-43a. In its Order granting the Competing Carriers' complaints brought under the IPUA, however, the ICC did not make a determination *under section 252* as required by section 252(e)(6). In fact, for a state commission to act "under section 252," its jurisdiction must be invoked pursuant to section 252, and the only way for that to occur is for a carrier to i) file a petition requesting mediation under section 252(a)(2), ii) file a petition requesting arbitration under section 252(b)(1), or iii) submit an agreement requesting approval under section 252(e)(1). The Competing Carriers, however, invoked the ICC's authority under Illinois law, and the ICC adjudicated their complaints under Illinois law. None of the findings and conclusions in the ICC's Order was made *under section 252*. The only state commission determinations that can be made under section 252 are those determinations made in the arbitration and approval process.

Section 252(e)(6) cannot be read to include state commission decisions interpreting previously approved agreements without rendering parts of the statute meaningless. For example, the FCC's authority to preempt state commission jurisdiction under section 252(e)(5) makes sense only with respect to the mediation and arbitration responsibilities given to state commissions under § 252. *See* 47 C.F.R. § 51.801 (1999). State commissions perform these section 252 responsibilities only upon specific request. 47 U.S.C. § 252(a)(2); *id.* § 252(b)(1). Similarly, the first sentence in § 252(e)(6) is rendered a nullity if the second

sentence is read to include state commission decisions interpreting and enforcing agreements. Indeed, the FCC is not authorized to preempt state commissions' jurisdiction to hear complaints brought under *state law*. *See* 47 U.S.C. § 152(b); *id.* § 252(e)(5). Congress carefully limited the application of sections 252(e)(4-6) to state commissions' "action[s]," "responsibilit[ies]," and "determination[s]" *under section 252*. The court of appeals' interpretation reads the limiting words "under this section" (*i.e.*, section 252) right out of section 252(e)(6).

That the Act denies federal district courts jurisdiction to review state commission orders interpreting and enforcing agreements is bolstered by section 252(e)(4). Section 252(e)(4) removes from state courts only the jurisdiction to review actions of state commissions in approving or rejecting agreements under section 252. Pet. App. 41a-42a. Congress very easily could have written: "No state court shall have jurisdiction to review the action of a State commission approving, rejecting, interpreting, and enforcing an agreement under this section." *See* 47 U.S.C. § 252(e)(4). It did not.[3] As the Act makes plain, Congress in section 252

3. A comparison of section 252(e)(6) with other provisions of the Act confirms that when Congress intended to allow federal review of any state actions it did so expressly. *See* 47 U.S.C. § 332(c)(7)(B)(iii) ("*Any decision* by a State or local government....") (emphasis added); 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by *any* final action or failure to act by a State or local government ... may ... commence an action in any court of competent jurisdiction ....") (emphasis added). These new subsections were enacted as section 704 of the Act.

created a four-part structure designed to establish agreements. The Act establishes a bright line between arbitrating and approving an agreement on one hand and interpreting and enforcing it, on the other. Congress recognized that state commissions are well-suited to address disputes arising from interconnection agreements, and for precisely that reason Congress left to state commissions and state courts the responsibility to supervise the performance of those agreements.

What is more, a party to an agreement cannot be "aggrieved" under section 252(e)(6) by a state commission decision *approving* the negotiated portion of an agreement. Section 252(e)(2) establishes the standards by which state commissions review interconnection agreements. When reviewing a negotiated portion of an agreement under section 252(e)(2)(A), a state commission may only reject that portion if it finds i) the negotiated portion discriminates against a telecommunications carrier not a party to the agreement, or ii) the implementation of the negotiated portion is not consistent with the public interest, convenience, and necessity. Hence, the only state commission determination made under section 252 involving a negotiated portion of an agreement by which a party to that agreement could possibly be "aggrieved" within the meaning of section 252(e)(6) is a state commission's determination *rejecting* the agreement.

The Competing Carriers and Ameritech Illinois voluntarily negotiated and executed the reciprocal compensation provisions and jointly submitted them to the ICC for approval as part of their interconnection agreements. Consequently, Ameritech Illinois cannot turn around and

claim that it is now "aggrieved" by the ICC's decision approving those very same contract provisions. Ameritech Illinois is not a party aggrieved by the ICC's decisions approving the voluntarily negotiated reciprocal compensation provisions. The court of appeals in effect transformed a claim challenging the ICC's Order interpreting voluntarily negotiated terms of previously approved interconnection agreements into a claim attacking the ICC's approval of those agreements under section 252(e)(1) in order to establish federal jurisdiction under section 252(e)(6).

B. Judicial Review of the ICC's Order Lay Exclusively in the Illinois Appellate Court.

The court's construction of section 252(e)(6) to require federal court review of every state commission action concerning agreements also violates section 601, the Act's rule of construction prohibiting implied preemption of state law. Pet. App. 45a. Before and after the Act, states possess plenary authority over local telephone matters unless that authority is expressly preempted. 47 U.S.C. § 152(b); *Iowa Utilities*, 119 S. Ct. 721, 731 n.8 (1999); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360, 370-71 (1986). The Act did not preempt existing state jurisdiction to resolve disputes between carriers calling for the interpretation and enforcement of agreements. There is absolutely no mention of the interpretation or enforcement of agreements in the Act. Because the Act makes no mention of enforcing agreements — indeed, Congress consciously removed from state courts in section 252(e)(4) only those state commission decisions approving or rejecting agreements, leaving state courts to review state commission enforcement decisions —

the authority to interpret and enforce agreements derives from a state commission's plenary authority under state law to resolve disputes over local telephone matters.

This Court's decision in *Iowa Utilities* confirms that review of the ICC's Order lay exclusively in the Illinois Appellate Court. The Court specifically observed that: Where the Act "is silent, § 152(b) [the provision establishing the dual federal-state regulatory model] continues to function." *Iowa Utilities*, 119 S. Ct. at 731 n.8. As mentioned above, the Act says nothing about the enforcement of agreements. In creating a process designed to establish agreements and requiring those agreements to be filed with state commissions, *see* 47 U.S.C. § 252(h), Congress deliberately left the supervision of the agreements to state commissions and subsequent judicial review to state courts.

In Illinois, specifically, the ICC's authority to supervise, interpret, and enforce agreements comes from state law, not the Act. In addition to its general authority over telecommunications carriers operating in Illinois, *e.g.*, 220 ILCS 5/10-201; *id.* § 5/13-101, the ICC is specifically empowered to resolve disputes and enforce agreements regardless of whether it approved a particular agreement under section 252, *id.* § 5/13-514(8). The means for obtaining review of ICC orders is set forth in section 5/10-201, which fixes review exclusively in the Illinois Appellate Court. 220 ILCS 5/10-201. Thus, the court's decision requiring carriers complaining of ICC actions concerning an agreement to seek federal court review preempts section 5/10-201 of the IPUA in violation of section 601 of the Act.

In sum, section 252(e)(6) does not confer plenary jurisdiction on federal courts to review every action of state commissions concerning interconnection agreements. Given the precision with which Congress tailored the provisions in section 252, it is clear that the Act limits federal district court review to state commission determinations made in the arbitration and approval process. The court of appeals impermissibly expanded federal jurisdiction beyond that which Congress expressly provided for in section 252(e)(6) to include subsequent state commission orders resolving complaints brought under state law calling for the interpretation of disputed provisions in agreements.

II. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings* and Conflicts With the Sixth Circuit's Decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).

The court of appeal's constructive waiver holding is contrary to *College Savings* and the Court's cases requiring a deliberate, express waiver of immunity by the state itself. In *College Savings*, the Court expressly overruled *Parden v. Terminal Ry. Co. of Alabama Docks Dep't*, 377 U.S. 184 (1964), and repudiated the doctrine of constructive waiver under the Commerce Clause. The Court rejected the idea of implied waiver of state sovereign immunity as incompatible with its cases requiring an express waiver of immunity by the state itself. *College Savings*, 119 S. Ct. at 2228. *College Savings* confirms that a state's waiver must be a deliberate, express waiver made by the state itself and, like federal sovereign immunity waivers, cannot be implied. *Id.* at 2228-29. In this case, no party claimed nor could it, that Illinois expressly waived the state's immunity from suit in federal

court. Illinois has not expressly waived its Eleventh Amendment immunity from suit in federal court, *see Frances J. v. Wright*, 19 F.3d 337, 342-43 (7th Cir. 1994), and the ICC and the Commissioners are not authorized to waive Illinois' sovereign immunity, *see Estate of Porter v. Illinois*, 36 F.3d 684, 690 (7th Cir 1990) ("State officials can only waive a State's immunity if they are specifically authorized to do so by the state's constitution, statutes, or decisions."). Thus, after *College Savings*, this express waiver inquiry is dispositive, and Illinois cannot be found to have waived its immunity from suit in federal court.

In finding that Illinois waived its immunity, the court of appeals followed its earlier decision in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999), in which the court determined that the ICC's voluntary participation in the arbitration and approval functions in the Act constituted a constructive waiver of Illinois' sovereign immunity. Pet. App. 12a-13a. As mentioned earlier, the ICC and the Commissioners strongly disagree with the *MCI* court's constructive waiver holding and have sought review of that court's opinion on rehearing in this Court. Nevertheless, this case is fundamentally different from *MCI*. In *MCI*, plaintiff MCI petitioned the ICC to arbitrate open issues under section 252(b)(1) and submitted an agreement for approval under section 252(e)(1). *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 330 (7th Cir. 2000). MCI then sought review under section 252(e)(6) of the ICC's actions in arbitrating and approving the agreement. *Id.*

Here, however, the Competing Carriers brought complaints against Ameritech Illinois under Illinois law that

called for the interpretation and enforcement of their agreements. The ICC resolved those complaints in favor of the Competing Carriers. Ameritech sought review of the Order in federal court under section 252(e)(6). The Order is not the result of proceedings initiated under section 252. The ICC has a statutory obligation to adjudicate complaints, and its duty to enforce agreements under the IPUA exists regardless of whether it performed the arbitration and approval functions under section 252. *See* 220 ILCS 5/10-108-10, *id.* § 5/13-514(8). The ICC cannot choose not to act on complaints filed under state law. To do so would be an abdication of its sate statutory obligations. The court of appeals failed to appreciate this crucial distinction and held that a state commission constructively waives its sovereign immunity by adjudicating any complaint brought under state law calling for the interpretation and enforcement of an interconnection agreement. The court's opinion finding that Illinois constructively consented to suit in federal court by acting upon complaints filed under state law calling for the interpretation and enforcement of interconnection agreements between Ameritech Illinois and the Competing Carriers is contrary to *College Savings*.

In addition, the Seventh Circuit's constructive waiver holding conflicts with the Sixth Circuit's opinion in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). In *GTE*, the Sixth Circuit stated that "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity." *GTE*, 209 F.3d at 922 n.6. It is even clearer that in adjudicating complaints brought under state law a state commission does not constructively

waive the state's sovereign immunity. Indeed, even to ask whether a state commission constructively waives a state's sovereign immunity from suit in federal court when adjudicating complaints brought under *state law* is a non sequitur. Because the Seventh Circuit's constructive waiver holding conflicts with *College Savings* and *GTE*, the Court should grant review.

III. The Decision Below Conflicts With *Ex Parte Young*, 209 U.S. 123 (1908).

Although the court of appeals asserted jurisdiction over the ICC, through the Commissioners, it did not determine whether Ameritech Illinois' claims against the Commissioners fit within the narrow *Ex parte Young* exception to the Eleventh Amendment. In allowing Ameritech Illinois' claims against the Commissioners, the court erred because 1) Congress did not intend for *Ex parte Young* actions to be brought against individual state commissioners, 2) Ameritech Illinois did not allege a constitutional violation which is a necessary predicate for application of *Ex parte Young*, and 3) Ameritech Illinois did not allege an ongoing violation by the Commissioners.

A. Congress Did Not Intend for *Ex parte Young* Actions to Be Brought Against Individual State Commissioners.

The threshold question in the *Ex parte Young* inquiry is whether Congress intended to authorize *Ex parte Young* actions. *Seminole Tribe v. Florida*, 517 U.S. 44, 75 n.17. If Congress did not intend to authorize suits against state officials as individuals, then the *Ex parte Young* exception is

unavailable. Here, the purpose and structure of the Act and the plain language in section 252(e)(6), make clear that Congress did not intend for review of state commission determinations made under section 252 to be accomplished through *Ex parte Young* actions against the commissioners themselves. The Act does not authorize actions against individual state officials. The Act refers only to state commissions. The term "state commissioner" or "commissioner" is not even mentioned in the Act. More particularly, section 252(e)(6), the articulated basis for federal jurisdiction, refers only to state commissions. The court of appeals failed to undertake this initial inquiry and, as a consequence, erred in allowing Ameritech Illinois' claims against the Commissioners. *See* Pet. App. 14a.

The court of appeals also failed to reconcile its reading of the Act to require review of administrative agency actions — whether state commission or FCC — with a suit against the individual commissioners under an *Ex parte Young* theory. *Id.* The court construed section 252(e)(6) to require that state commissions be made parties to suits reviewing their actions "just as the FCC is a party to suits seeking review of its actions." *Id.* (internal quotations omitted). Thus, in the court's view, section 252(e)(6) provides for judicial review of regulatory actions made by an administrative agency, whether federal or state. Under federal law, the FCC is named as a party to appeals from its orders. *Ingalls Shipbuilding v. Director, OWCP*, 519 U.S. 248, 267 (1997); *see* Fed. R. App. P. 15(a) (requiring that agency be named respondent in review of its orders). There is no indication in section 252(e)(6) that an aggrieved party may sue the FCC commissioners individually or that it may seek declaratory,

injunctive, or relief other than administrative review of the FCC's actions. Similarly, under Illinois law the ICC is named as a party to appeal of its orders, 220 ILCS 5/10-201; 155 Ill.2d R.335(a), and there is no indication in section 252(e)(6) that an aggrieved party may sue a commissioner of a state commission or that it may seek declaratory, injunctive, or relief other than administrative review of a state commission's determinations made under section 252. Indeed, it would be anomalous if Congress had intended to expose state commissioners "to the full panoply of a federal court's remedial powers, including, presumably, contempt sanctions," when the Act, as interpreted by the court, contemplates judicial review of administrative agency action. *Seminole Tribe*, 514 U.S. at 75. The court's reading of the review provided in the Act is simply incompatible with an action based on an *Ex parte Young* theory.

Furthermore, in simply treating the ICC and the Commissioners as interchangeable parties, the court failed to appreciate the larger principle reconfirmed in *Seminole Tribe*, that where Congress creates a remedial scheme for the enforcement of a particular federal right, the courts should not supplement that remedial scheme with additional remedies. Section 252 establishes a limited remedial scheme for review of state commission determinations made in approving or rejecting agreements. The review under section 252(e)(6) does not include federal district court review of state commission orders interpreting previously approved agreements or suits against individual state commissioners to otherwise accomplish federal review of those state commission orders. In this case Ameritech Illinois brought an action against the Commissioners under section 252(e)(6)

to circumvent the review provided for under Illinois law and impermissibly enlarge its rights under the Act. The court of appeals rewrote the statutory scheme, rendered superfluous the limited statutory remedy provided under section 252(e)(6) and permitted Ameritech Illinois to obtain relief against the individual commissioners that it could not otherwise obtain. As a consequence, the court's opinion allowing *Ex parte Young* actions under the Act was improper and contrary to this Court's precedent.

B. The *Ex Parte Young* Exception Applies Only to Ongoing Constitutional Violations by State Officials.

The basis of the *Ex parte Young* doctrine is that when a state officer acts in violation of the Constitution, he cannot claim to be acting on behalf of the state for purposes of the Eleventh Amendment and, therefore, an action against him is not a suit against a state barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 88, 102 (1984) ("*Pennhurst II*"). To the ICC's knowledge, in the time since *Ex parte Young* was decided, this Court has not expanded the narrow *Ex parte Young* exception beyond alleged constitutional violations. This is not surprising since the Court has repeatedly instructed that the *Ex parte Young* exception is a narrow exception, not to be given an expansive interpretation. *E.g.*, *Pennhurst II*, 465 U.S. at 102.

The *Ex Parte Young* exception is inapplicable to Ameritech Illinois' claims because the company did not allege that the individual commissioners violated the

Constitution, whether by virtue of the Supremacy Clause[4] or more familiar constitutional provisions. In allowing the claims against the Commissioners the court of appeal's decision is contrary to long-standing precedent of this Court limiting application of the *Ex parte Young* exception to alleged constitutional violations and, if there were any doubt, the Court's recent sovereign immunity cases resolve it.

This Court's sovereign immunity decisions last Term confirm that the *Ex parte Young* exception applies only to ongoing constitutional violations by state officials. In *College Savings* and *Alden*, the Court reaffirmed that state sovereign immunity is *constitutional*, deriving from the structure of the Constitution itself. *College Savings*, 119 S. Ct. 2230; *Alden*, 119 S. Ct. at 2254. The Court also reaffirmed that the principle of state immunity embodied in the Eleventh Amendment is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Alden*, 119 S. Ct. at 2266. The *Ex parte Young* doctrine, however, is a judicially-created narrow exception to the Eleventh Amendment. It represents an attempt by the Supreme Court to "harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Pennhurst II*, 465 U.S. at 105.

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4. Importantly, the Supremacy Clause is not a source of federal rights; rather it secures federal rights by according them priority when they come into conflict with state law. *Golden State Transit v. Los Angeles*, 493 U.S. 103, 107 (1989).

As *Alden* confirms, the *Ex parte Young* exception to the Eleventh Amendment is necessary to ensure the *Constitution* "remains the supreme law of the land." *Alden*, 119 S. Ct. at 2263. Thus, although state sovereign immunity is constitutional, the Court has determined that such immunity must yield in certain cases to protect other rights and privileges secured by the Constitution. Consequently, *Ex parte Young* requires a constitutional predicate for its application. In fact, given the constitutional origins of sovereign immunity and its limits on congressional power under Article I and federal judicial power under Article III, there would appear to be little difference between Congress using its Article I powers to abrogate a state's Eleventh Amendment immunity (an action found to be without constitutional authority in *Seminole Tribe*) and a federal court using *Ex parte Young* to accomplish the same result by allowing private suits alleging nonconstitutional, federal statutory violations by state officials. In each case, the *constitutional* justification for such action is lacking.

Here, Congress had no constitutional authority to subject Illinois to private suits in federal court under the Act, an exercise of Congress' commerce power. The ICC's adjudication of the Competing Carriers' complaints, in which it resolved disputes over privately negotiated reciprocal compensation provisions in interconnection agreements, did not challenge the supremacy of the Constitution or violate any right protected by the Constitution. *See Alden*, 119 S. Ct. at 2263. Unlike a typical *Ex parte Young* action brought to enjoin a state official's enforcement of a state law alleged to conflict with federal law, in this case Ameritech Illinois claimed the ICC erred in

interpreting privately negotiated portions of its agreements — an action state law specifically authorizes the ICC to take. *See Papasan v. Allain*, 478 U.S. 266, 277 (1986) ("In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal.").

The ICC is specifically authorized under state law to decide the issues raised in the Competing Carriers' complaints. 220 ILCS 5/13-514(8); *see id* §§ 5/10-101; 5/10-108. No contrary claim was advanced, nor could it be. Given the power to make such decisions, however, an allegedly erroneous decision is insufficient to strip Illinois of its constitutional sovereign immunity through an *Ex parte Young* action against the Commissioners. As the Court stated in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949):

> It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. We therefore reject the contention here.

Id. at 695 (citation omitted); *see Pennhurst II*, 465 U.S. at 113 n.22 ("*Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it."); *see Newkirk v. Bigard*, 109 Ill. 2d 28, 37-38 (1985) ("An agency's jurisdiction or authority is not lost merely because its order may be erroneous). Accordingly, the court erred in finding that the individual commissioners could be sued in an *Ex parte Young* action when Ameritech Illinois failed to allege any violation of the Constitution.

C. The ICC's Order Does Not Constitute an Ongoing Violation.

The court of appeals further erred by not inquiring as to whether Ameritech Illinois' complaint for judicial review alleged ongoing violations and requested prospective relief, as required by this Court. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court expressly confined the *Ex parte Young* exception to suits requesting prospective injunctive relief to prevent future violations of federal law. *Id.* at 655. "Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past...." *Papasan*, 478 U.S. at 277-78. The focus of the *Ex parte Young* inquiry is on the *actions of the state officials*, and the relevant inquiry is whether prospective relief could prevent an ongoing violation of federal law by *state officials*. *Pennhurst II*, 465 U.S. at 102-03; *Lett v. Magnant*, 965 F.2d 251, 255 (7th Cir. 1992). In allowing Ameritech Illinois' claims for

review of the ICC's Order to go forward against the Commissioners, the court's opinion eviscerates the limitations on the *Ex parte Young* exception and is contrary to this Court's decisions.

The ICC in its Order resolved a dispute between the carriers regarding the interpretation of privately negotiated provisions in their agreements. In seeking federal review of the Order, Ameritech Illinois requested a declaration that the ICC violated federal law in the past, relief not within the narrow *Ex parte Young* exception. Ameritech also purportedly sought to enjoin enforcement of the ICC's Order. Properly characterized, Ameritech sought reversal of the ICC's Order. Pet. App. 14a ("Ameritech said that it brought this action to 'challenge the ICC Order.'"). That the ICC's Order is still in place does not transform that past decision into a present, ongoing violation by the Commissioners. Ameritech Illinois did not claim that the Commissioners themselves were violating federal law when it filed its claims, let alone that they were continuing to violate federal law afterwards. In short, Ameritech Illinois sought relief from a past ICC decision, but the ICC's Order itself does not constitute the ongoing violation for purposes of *Ex parte Young*. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir.), *aff'd sub nom. Breard v. Greene*, 523 U.S. 371 (1998).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 28, 2000

APPENDIX A – ORDER, DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED AUGUST 9, 2000

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 9, 2000

Nos. 98-3150, 98-3322 & 98-4080

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,

Plaintiff-Appellant,
Cross-Appellee,

v.

WORLDCOM TECHNOLOGIES, INC. as successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONS GROUP INC., MCI TELECOMMUNICATIONS CORP. and MCIMETRO ACCESS TRANS-MISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION,

Defendants-Appellees,

and

DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 98 C 1925
David H. Coar, Judge

Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terrence T. Evans, *Circuit Judge*

ORDER

Petitions for rehearing and petitions for rehearing en banc have been filed in this case. The decision on rehearing issued in *MCI Telecommunications Corp. v. Illinois Bell Telephone Co. & The Illinois Commerce Commission*, __ F.3d __ (7th Cir. July 24, 2000), does not require that we make any changes to the opinion we issued on June 18. 1999. For this and other reasons, the petitions for rehearing are unanimously denied. No judge has requested a vote on the petitions for rehearing en banc.[1] Accordingly, those petitions are also denied.

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1 Chief Judge Joel M. Flaum and Circuit Judges John L. Coffey and Ilana Diamond Rovner took no part in the consideration of these petitions for rehearing.

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AMENDING JUNE 18, 1999 OPINION, DATED AUGUST 19, 1999

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 19, 1999

Nos. 98-3150, 98-3322 & 98-4080

ILLINOIS BELL TELEPHONE COMPANY d/b/a/ AMERITECH ILLINOIS,

Plaintiff-Appellant,
Cross-Appellee,

v.

WORLDCOM TECHNOLOGIES, INC., as successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONS GROUP, INC., MCI TELECOMMUNICATIONS CORP. and MCIMETRO ACCESS TRANS-MISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC. and FOCAL COMMUNICATIONS CORPORATION,

Defendants-Appellees.

and

DAN MILLER, RICHARD KOHLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT

BOHLEN, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),

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David H. Coar, *Judge.*

Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

ORDER

The petitions for rehearing and rehearing en banc will be held in abeyance pending the decision on rehearing in *MCI Telecommunications Corp. v. Illinois Commerce Commission,* No. 98-2127. Within 10 days after the panel releases its opinion on rehearing in *MCI*, the parties should file supplemental memoranda discussing the effect, if any, of *MCI* on this case.

The court amends its opinion by adding the following language at the end:

> Lest there be any misunderstanding about what this conclusion means, we add that any issues of state law remain open for determination in the proper forum. Section 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision "interpreting" an

agreement contrary to its terms creates a different kind of problem--one under the law of contracts, and therefore one for which a state forum can supply a remedy.

This allocation of authority has a potential to cause problems. Federal jurisdiction under § 252 (e)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no." This system may not have much to recommend it, but, as the Supreme Court observed in *Iowa Utilities Board*, the 1996 Act has its share of glitches, and if this is another, then the legislature can provide a repair.

APPENDIX C – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED JUNE 18, 1999

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 98-3150, 98-3322, and 98-4080

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,

Plaintiff-Appellant, Cross-Appellee,

v.

WORLDCOM TECHNOLOGIES, INC. as successor in interest to MFS INTELENET OF ILLINOIS, INC. TELEPORT COMMUNICATIONS GROUP, INC., MCI TELECOMMUNICATIONS CORP. and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION,

Defendants-Appellees,

and

DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),

Defendants-Appellees, Cross-Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 1925 -- **David H. Coar**, Judge

ARGUED MAY 10, 1999 -- DECIDED JUNE 18, 1999

Before Bauer, Kanne, and Evans, *Circuit Judges*.

Evans, *Circuit Judge*. Once we determine whether we have jurisdiction (and the scope of that jurisdiction) under the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, what we will have before us today is a rather narrow issue on the merits: whether a decision of the Illinois Commerce Commission regarding reciprocal compensation for telephone connections to Internet service providers violates federal law.

Until the 1990's local phone service was monopolistic; in fact, many people viewed it as a natural monopoly. Regulation was left to the states. Now, technological advances have taken us far beyond the sort of telephone services parodied by Ernestine.[1] Today, we even have competition in local markets. Through the Telecommunications Act of 1996 Congress has opened the door to competing local exchange carriers and has inserted both the Federal Communications Commission (FCC) and the federal courts into the previously

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1 Lily Tomlin's character on Rowan and Martin's 1960's TV show, Laugh-In who with an officious tone and a lot of nasal snorting sat at her switchboard and asked, "Have I reached the party to whom I am speaking?"

state-regulated monopoly. Just how far into the scheme does the federal presence reach? is the $64,000 question.

Illinois Bell Telephone Company, doing business as Ameritech Illinois (Ameritech) is the incumbent local exchange carrier in Chicago and most of the rest of Illinois. Worldcom Technologies, Inc., Teleport Communications Groups, Inc., MCI Telecommunications Corp., Inc. and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation have, under the Act, recently become competitors with Ameritech for local telephone business. When a competitor builds its own local network it interconnects its facilities with Ameritech so that calls can be made between customers of the two networks. For example, when an Ameritech customer makes a call, the person or entity called may be the customer of another of the carriers; Ameritech bills its customer for the call as a local call. The same is true if a customer of a competing carrier calls an Ameritech customer. If this were all that happened, the carrier whose customer received the call would not be compensated for its part in the transaction. But the 1996 Act provides for "reciprocal compensation" for local calls and it requires companies to establish agreements for intercarrier compensation for the calls. If the call is a local call, then, under the Act in the first example, Ameritech would have to pay reciprocal compensation to the other carrier for "terminating" the call (in the lingo of the industry). In this way, both carriers get money. Ameritech and each of the other carriers have interconnection agreements as required by the Act, 47 U.S.C. §§ 252(b)(5) and 252(d).

Section 252(d) sets out the procedure by which interconnection agreements are to be reached. The carriers must first attempt to negotiate in good faith to reach voluntary agreements. At any time in the negotiations a party may ask a state commission to participate as a mediator. If no agreement is reached, the Act provides for compulsory arbitration of unresolved issues. Any party may petition a state commission to arbitrate the dispute. Furthermore, any agreement reached by negotiation or arbitration must be submitted to the state commission for approval. If a state commission fails to carry out its responsibilities, the FCC will preempt the state commission's jurisdiction and act for the state commission. A state commission's failure to approve or reject an agreement, however, it is not a failure to act; rather, the agreement will be deemed approved.

The interconnection agreements between Ameritech and each of the carriers in this case are nearly identical. They became effective in late 1996 and early 1997 and have been approved by the Illinois Commerce Commission (ICC). For a time, the parties routinely paid reciprocal compensation under the agreement.

Trouble arose, however, when Ameritech became concerned that it was paying out more in reciprocal compensation than it was collecting. On July 3, 1997, it sent a letter to the other carriers, claiming that the imbalance was due to their inclusion of calls involving Internet service providers (ISPs) in the requests for reciprocal compensation. Ameritech said that it would no longer pay compensation for calls to Internet service providers because those calls were not local calls. It seems that the other carriers may have been concentrating their marketing on ISPs. The agreements provided

for compensation per minute of use, and calls to ISPs are, quite predictably, of long duration.

That is true because Internet service providers are companies which offer their customers connections to the Internet through the telephone network. ISPs are assigned a local telephone number and the telephone companies, including Ameritech, bill their customers for a local call when the customers call ISPs within the local calling area. However, the ultimate connection is usually to a website in a distant location, giving Ameritech a basis for claiming that the calls were not local calls subject to the reciprocal compensation agreements. For reasons we need not get into, Ameritech is not obligated to compensate the carrier of the ISP if the call is deemed to be long-distance, rather than local. In other words, at the present time if a call to an ISP is not subject to reciprocal compensation, the ISP's carrier is not compensated.

Not surprisingly, when Ameritech cut off payments the other carriers filed complaints with the ICC. On March 11, 1998, the ICC ruled in their favor, finding that the plain language of the agreements mandates reciprocal compensation; that there is no basis for treating these calls differently from other local calls. The ICC, in fact, called Ameritech's conduct anti-competitive.

Ameritech filed the present case in the District Court for the Northern District of Illinois, naming as defendants the competing carriers and the Commissioners of the ICC in their official capacity. Ameritech also filed a petition for review of the order in a state court. District Judge David H. Coar, to whom the federal case was assigned, reached a decision, as Ameritech says, "affirming the ICC Order" on July 21, 1998, and entered judgment in favor of the competing companies on August 4, 1998. In entering judgment under Rule 54(b) of the Federal Rules of Civil Procedure, Judge Coar stated:

> This Court has currently pending motions to dismiss the Illinois Commerce Commission [which, correctly labeled, would be a motion of the Commissioners] from this action. Because of the novelty and urgency of the issues presented on the merits of the action and because the Eleventh Amendment issues presented by the Commission's Motions to Dismiss were not related to the merits of the underlying claim, this Court directed the Commission to participate in briefing of the issues on the merits without prejudice to its rights to proceed on its Eleventh Amendment motions.

On August 25 the motions of the Commissioners to dismiss the action were denied. Before August 25 Ameritech had filed an appeal of the July 21 decision; after the decision on the motions to dismiss, it filed a second notice of appeal naming all defendants; the Commissioners filed a cross-appeal. All three appeal were consolidated.

Appellate jurisdiction over the Commissioners is somewhat problematic in that no formal judgment was entered against them. However, it is clear that the Commissioners participated in the litigation on the merits of this action. In entering judgment pursuant to Rule 54(b) on August 4, Judge Coar made it clear that his decision disposed of the merits of the case, but also allowed the Commissioners to continue

with their claim that the federal court was a forum in which they did not belong, obviously an issue which should have preceded a decision on the merits. The decision on the motions to dismiss resolved that issue, making the decision on the merits binding on the Commissioners (a decision, of course, going in their favor). It is a situation in which "formal defects in the terminating order do not prevent appeal." *Otis v. City of Chicago*, 29 F.3d. 1159, 1165 (7th Cir. 1994). *See also Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). Although we conclude that we have jurisdiction over the appeal as it involves the Commissioners, we are dismayed by this snag and, we might add, by the cursory manner in which Ameritech and the Commissioners treated the issue, despite our order to brief it.

We proceed to the merits. The issue as Ameritech presented it to us is whether the calls to Internet service providers are local calls, subject to reciprocal compensation, or long-distance calls, often interstate. That is the issue which was exhaustively briefed; that, in fact, is the easy issue. But that is not, and cannot be, the issue we decide.

The appeal of the Commissioners of the Illinois Commerce Commission will lead us, however circuitously, to the real issue before us. The Commissioners contend that the federal courts have no jurisdiction over them. Originally they contended that, among other things, sovereign immunity prevents federal courts from exercising jurisdiction over them in their official capacity because in their official capacity they are the Commission, a state entity, and the State of Illinois has not waived its sovereign immunity. That argument is no longer tenable following our recent decision in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir. 1999), in which we determined that the participation of the Commission in the scheme set out in the Act is a waiver of the state's sovereign immunity.

Another of the Commissioners' contentions, however, is that the Act, which admittedly provides for some federal court review over some actions of the state commissions, does not provide review in this instance. This is an attack on our subject matter jurisdiction. The Commissioners say that the scope of review under § 252(e) is limited to review of an "agreement"; nowhere, they say, is a "federal district court authorized to review and *order* of a state commission under state law. . . ."

Section 252(e)(6) says in part:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

The commissioners rely on the word "agreement" and ignore the word "determination" despite the fact that in an earlier order in this case --- *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998) -- we said flatly, "Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts." In addition, although the present case arises in a slightly different context, our decision in *MCI* explains the nature of our jurisdiction. We noted that subsection 252(e)(6) provides for ju-

dicial review of "state commission actions," not simply review of "interconnection agreements" and that subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court. It provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." We concluded that this language meant that Congress envisioned suits reviewing "actions" by state commissions and that those suits were to be brought exclusively in the federal courts. In addition, we said that Congress intended that the "state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions." At 320.

Of course, the Commission itself is not a party to the action before us even though, in its briefing in this court, Ameritech said that it brought the action to "challenge the ICC Order." Similarly, in its complaint Ameritech said that it was filing the action pursuant to § 252(e) to challenge determinations made by the Illinois Commerce Commission. Even though the Commission is not a named party, the Commisisoners themselves acknowledge that. In their official capacity, they are the Commission. We have jurisdiction under § 252(e)(6) to review the actions of the Commission and will proceed on that basis.

But what is the scope of review under § 252(e)? Writing for the Court in *AT&T v. Iowa Utilities Board,* 119 S. Ct. 721, 733 n.10 (1999), Justice Scalia indicated that the Act was broad federal occupation of territory once belonging to the states and that in turning some "federal policymaking . . . over to state administrative agencies," Congress set out a

scheme which "is decidedly novel." He continued, "saying that the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well," or, as he put it elsewhere, it is a "surpassing strange" setup. At 730 n.6.

Our view of the scope of review, however, has already been set out in *MCI* in which we indicated that we would review a state commission's action for "compliance with the requirements of § 251 and § 252 of the Telecommunications Act . . . ." We also said that we would not review those actions for compliance with state law. 168 F.3d at 320. The issue before us today, then, is whether the ICC, in determining that under the agreements the parties intended that calls to Internet service providers would be subject to reciprocal compensation, violated federal law.

We have long given deference to the pronouncements of the FCC. *See, e.g., FCC v. National Citizens Comm. for Broad.,* 436 U.S. 775 (1978); *Illinois Bell Tel. Co. v. FCC,* 740 F.2d 465 (1984). It also appears that none of the telephone companies involved in the present case dispute that deference is in order; in fact, not surprisingly in this instance, everyone thinks the FCC is on its side. That agency is in the process of calling for hearings on proposed rules and will presumably carry out its duty to resolve ambiguities in the statute. *Iowa Util. Bd.*, 119 S. Ct. at 738. But in the absence of a rule, the agency issued a declaratory ruling on February 26, 1999, on the issue of whether calls to Internet service providers are local calls. *See* Declaratory Ruling in CC Docket No. 96-98 (February 26, 1999). The ruling was issued after the briefing in this appeal and obviously after the agreements at issue here were drafted.

The FCC said

> that the communications at issue here do not terminate at the ISP's local server, as CLEC's [competing local exchange carriers] and ISP's contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state.

Declaratory Ruling at 9 ¶ 12. The FCC declined to separate ISP-bound traffic into two components: an intrastate service going to the local ISP and a portion, more likely than not to be interstate, going from the ISP to the websites. The conclusion was that ISP traffic for "jurisdictional purposes [is] a continuous transmission from the end user to a distant Internet site." At 11 ¶ 13. This is the part of the ruling which Ameritech likes.

But having determined its jurisdiction, the FCC went on to a discussion of regulation of the calls in the absence of a rule covering compensation for these calls. It is this part of the ruling that the other carriers prefer. Because there is no rule yet promulgated on this issue, the FCC said:

> We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

At 15 ¶ 21. So parties may

> voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.

At 15 ¶ 22. Even if ISP traffic is largely interstate, parties may have agreed to treat it as subject to reciprocal compensation or, in fact, a state commission may impose reciprocal compensation in arbitration proceedings:

> A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

At 18 ¶ 26.

Now that the FCC has issued its ruling, and noting again that we defer to its reasonable interpretations of the Act, our task is to examine the ICC order, not to determine whether the ICC correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation.

The short answer is that it does not. The FCC could not have made clearer that in the absence of a rule, a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.

The agreements here provide:

> Reciprocal Compensation applies for transport, and termination of Local Traffic billable by Ameritech or [the other carrier] that a Telephone Exchange Service Customer originates on Ameritech's or [the other carrier's] network for termination on the other Party's network.

All the contracts contain the following definition, " 'Reciprocal Compensation' is As Described in the Act." In the contracts with AT&T, Focal Communications Corporation, Worldcom Technologies, Inc., MCIMetro Access Transmission Services, another relevant definition is " 'Local Traffic' means a call the distance of which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation . . . ." The "Commission" referred to is the Illinois Commerce Commission. The contract with Teleport Communications Group provides that " 'Local Traffic' means local service area calls as defined by the Commission," which again is the ICC.

The ICC concluded that the agreement unambiguously provide that:

> reciprocal compensation is applicable to local traffic billable by Ameritech. Since Ameritech Illinois currently charges end users local service charges when completing calls that terminate at the complainants' ISP customers, the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to those calls.

ICC order dated March 18, 1998, at 11.

Ameritech attacks this conclusion primarily by stating that the Act does not require reciprocal compensation; the agreements precisely track the Act (reciprocal compensation is "as described in the Act"); therefore the agreements cannot require reciprocal compensation for calls to ISPs.

The syllogism is an oversimplification. That the Act does not *require* reciprocal compensation for calls to ISPs is not to say that it *prohibits* it. The Act simply sets out the obligations of all local exchange carriers to provide for reciprocal compensation: "Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." § 251 (b)(5). Then in § 252 (d)(2) state commissions are instructed that terms and conditions for reciprocal compensation are not to be considered reasonable unless they provide "for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and that the costs be determined on the basis of a "reasonable approximation of the additional costs of terminating such calls." The Act clearly does not set out spe-

cific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work cut.

The ICC's conclusion -- that reciprocal compensation should apply to traffic Ameritech bills as local traffic -- does not violate the Act or the FCC's interpretation of the Act. In fact, the Commission was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements. The FCC sets out factors which the state commissions may consider in evaluating the parties' intentions, concluding that the factors are illustrative only and that state commissions, not the FCC, are the arbiters of what factors are relevant in the determination. At 15 ¶ 24.

Predictably, however, Ameritech questions the ICC's determination regarding the parties' intentions. Ameritech contends that the agreements were negotiated against a backdrop of a long-standing FCC policy that ISP traffic is not local traffic. But that contention is shaky. In fact, the FCC recognized that agreements negotiated prior to the February ruling, as the ones at issue here were, were negotiated in the "context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements." At 15 ¶ 24. Undeterred, Ameritech points to prior statements and actions of the FCC, which could be interpreted as at least hinting that such traffic may ultimately be considered interstate. One such factor is that ISPs have long had an exemption from paying access fees for their connections to distant websites. The argument is that there would be no need for an exemption were the calls not interstate. Ameritech also relies heavily on *In re GTE Telephone*

Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, CC Docket No. 98-79 (F.C.C. Oct. 30, 1998), and to a lesser degree on *In re Bell Atlantic, Tel. Cos.; Bell Atlantic Tariff No. 1; Bell Atlantic Transmittal No. 1076,* CC Docket Nos. 98-168 et al. (F.C.C. Nov. 30 1998), for the proposition that Internet traffic terminates on the Internet, not at the local server. Consequently, Ameritech says, "Internet traffic is not subject to reciprocal compensation under the Agreements or federal law." It is only in a footnote in its brief filed December 23, 1998, that Ameritech acknowledges another statement, in our view an important statement, made by the FCC. We quote from *GTE*:

> This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including, circuit-switched dial-up traffic originated by interconnecting LECs.

At 1-2 ¶ 2. Also, in *GTE,* the FCC announced its attention to issue a separate order on reciprocal compensation issues, a reference, of course, to the February ruling. Putting aside the obvious fact that both *GTE* and *Bell Atlantic* were issued after the agreements in this case and so are not relevant to what the parties had in mind at the time of the negotiations, it seems clear that the FCC would not agree with Ameritech that it has had a long-standing policy against treating calls to ISPs as local calls.

There is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes. The ICC considered relevant fac-

tors in evaluating the agreements, including the situation at the time the agreements were negotiated. Other relevant factors are that Ameritech's customers do not pay toll charges for calls to their ISP; Ameritech bills the customer for a local call. Customers dial a local number. The calls are routed over local lines, not long distance lines. Also quite telling from our point of view is that in the agreements, the parties specifically granted to the ICC the right to define local traffic for reciprocal compensation purposes.

The FCC could not have made clearer its willingness -- at least until the time a rule in promulgated -- to let state commissions make the call. We see no violation of the Act in giving such deference to state commissions; in fact, the Act specifically provides state commissions with an important role to play in the field of interconnection agreements. Additionally, the ICC is in the mainstream of thought on the issue. Not that the majority rules in these matters, but the commissions in well over half the states have made the same determination that the ICC made, including some interpretations made after the February ruling. In short, nothing in what the ICC said violates federal law in existence at this time. We affirm the decision of the district court affirming the order of the Illinois Commerce Commission.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX D – MEMORANDUM OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, DATED AUGUST 25, 1998

No. 98 C 1925

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,

Plaintiff,

v.

WORLDCOM TECHNOLOGIES, INC. as a successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONSGROUP INC., MCI TELECOMMUNICATIONS CORPORATION and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION and DAN MILLER, RICHARD KOLHAUSER,RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (In Their Official Capacities and not as Individuals),

Defendants.

JUDGE DAVID H. COAR

MEMORANDUM OPINION AND ORDER

Currently before the court is the defendant Commissioners' first and second motions to dismiss the complaint of Illinois Bell Telephone Company. For the reasons stated in this

Memorandum Opinion and Order, the Commissioners' motions are DENIED.

I. PROCEDURAL BACKGROUND

Plaintiff Illinois Bell Telephone Co. d/b/a Ameritech Illinois ("Ameritech") filed the instant suit pursuant to Section 252(c)(6) of the Telecommunications Act of 1996,[1] Pub. L. No. 104-104, 100 Stat. 56 (1996) (codified at 47 U.S.C. § 151, *et seq.*) (the "Act" or the "Telecommunications Act"), 28 U.S.C. § 131 and 28 U.S.C. § 1367. The suit challenges a determination made by the Illinois Commerce Commission ("ICC" or "the Commission") regarding Interconnection Agreements between Ameritech and several of the defendants.

On May 18, 1998, the Commissioners of the ICC ("the Commissioners") filed a motion to dismiss arguing that the court lacks subject matter jurisdiction under 28 U.S.C.§ 1331 and that this case is barred by the Eleventh Amendment. On May 20, 1998, this court ordered briefing on the Commissioners' motion to dismiss. Due to the expedited nature of this case, this court determined that it would rule on the defendant's motion to dismiss separately from the ruling on the merits. On June 12, 1998, the Commissioners filed a second motion to dismiss, arguing that Ameritech's complaint was barred by the doctrines of collateral estoppel and res judicata and that this court should abstain from hearing this case under the doctrines of *Burnford* and *Younger*.

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1 For general background on the Telecommunications Act, see *MCI Telecommunications v. Illinois Bell Telephone Co.*, No. 97 C. 2225 *et al.*, 1998 WL 156678, at *1-2 (N.D. Ill. March 31, 1998).

On July 23, 1998, this court issued a Memorandum Opinion and Order on the merits of the instant action, upholding the ICC's determination that Internet calls are "local traffic" as defined by the Interconnection Agreements. *See Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, No. 98 C 1925, 1998 WL 419493 (N.D. Ill. July 23, 1998). This court's ruling was, however, without prejudice to the Commissioners' right to proceed on its motion to dismiss.

II. FACTS

Much of the background in the instant case is discussed in this court's earlier Opinion, so it is not necessary to review it in detail here. *See id.* *1. In 1996 and 1997, the ICC approved Interconnection Agreements entered into between Ameritech and the defendant carriers[2] in the instant case. The Interconnection Agreements all contained reciprocal compensation provisions whereby Ameritech and the defendant carriers agreed to compensate each other for the transport and termination of local traffic. Ameritech believed that, under the Agreements, Internet traffic was not "local" and refused to pay reciprocal compensation for the transport and termination of Internet traffic. According to Ameritech, such calls are properly classified as long distance and therefore not subject to reciprocal compensation. The defendant carriers filed complaints with the ICC regarding this issue. On March 11, 1998 the ICC issued a ruling determining that

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2 Teleport Communications Group, Inc., WorldCom Technologies, Inc. MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Corporation.

Internet calls are local. Ameritech subsequently filed the instant case seeking review of the ICC's order.

III. DISCUSSION

The defendant Commissioners' motions to dismiss raise four different arguments: (1) lack of subject matter jurisdiction; (2) Eleventh Amendment bar; (3) *res judicata* and collateral estoppel; and, (4) abstention. This court will analyze each argument in turn.

A. Subject Matter Jurisdiction

The Commissioners' first argument is that this court lacks subject matter jurisdiction to proceed. Specifically, the Commissioners state that neither Section 252(e)(6) nor 28 U.S.C. § 1331 authorizes this type of review in federal district court. The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depends upon the purpose of the motion. *See Freiburger v. Emery Air Charter, Inc.*, 795 F. Supp. 253, 256 (N.D. Ill. 1992); 5A Wright & Miller, *Federal Practice & Procedure: Civil.2d*, § 1363 at 456 (2d ed. 1990). If, as in the instant case, the motion simply challenges the sufficiency ~~of the~~ allegations of subject matter jurisdiction, the court must accept as true all well-plead factual allegations and draw all reasonable inferences in favor of the plaintiff. *United Transp. Union v. Gateway Western Ry. Co.*, 78 F.3d 1208 (7th Cir. 1996) (citing *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993)).

Ameritech asserts that subject matter jurisdiction is proper under Section 252(e)(6) of the Telecommunications Act. Section 252(e)(6) provides that:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C.§ 252(e)(6) (1998). The Commissioners first argue that ICC's order which is the subject of review in this case is not a "determination" within the meaning of Section 252(e)(6). Therefore, Ameritech cannot be "aggrieved" by a determination by the state commission and cannot bring an action under the Act. Second, the Commissioners contend that Section 252(e)(6) does not provide for federal court review of an order of a state commission involving the interpretation and enforcement of an Interconnection Agreement after the Agreement has been submitted to a state commission and approved. This court finds that neither argument has merit.

The Commissioners cite recent federal district court decisions in support of their position that the ICC has not made a reviewable "determination.". However, this court finds that the cases relied on by the Commissioners do not support such a position. *See GTE South Inc. v. Morrison*, 957 F. Supp. 800 (E.D. Va 1997); *GTE North v. Glazer*, 989 F. Supp. 922 (N. D. Ohio 1997); *GTE North v. McCarty*, 978 F. Supp. 827 (N.D. Ind. 1997); *GTE Northwest v. Hamilton*, 971 F. Supp. 1350 (D. Or. 1997). In all of these district court decisions, the court found that subject matter jurisdiction was lacking due to the fact that the state commission had not yet approved or rejected an interconnection agreement by the

parties. Therefore, the courts found that there was no "determination" that was ripe for review. *See e.g.*, *Morrison*, 97 F. Supp. at 804 ("The statute's structure and purpose would be thwarted if this Court's review commenced before the completion of the [state commission's] proceedings."). The instant case arises under a very different context. Here, Ameritech seeks review of a state commission decision interpreting and enforcing an already approved agreement. Therefore, the cases cited by the Commissioners are not controlling.

In a recent Eighth Circuit decision interpreting the Act, *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 804 n. 24 (8th Cir.1997), *cert. denied*, *AT&T Corp. v. Iowa Utilities Bd.* __ U.S. __, 118 S. Ct. 879 (1998), the court found stated that "[w]e believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." This court finds that such an interpretation of the Act is consistent with the goals and structure of the Act. To hold otherwise would be to allow the state commissions to make critical decisions interpreting federal laws and policies, which was not Congress' intent in passing a federal communications act. *See U.S. West Communications v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997)("[S]tate commissions, while having experience in regulating local exchange carriers in intrastate matters, have little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency."). The Act specifically provides that federal courts have exclusive jurisdiction to review Interconnection Agreements and to ensure that those agreements meet federal requirements. *See MCI*

Telecommunications, No. 97 C 2225 *et al.*, 1998 WL 156678 at *14 (finding that § 252(e)(6) provides for exclusive review of agreements in federal court); 47 U.S.C. § 252(e)(4)("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). Allowing state court review of state commissions' rulings interpreting agreements would run afoul of Congress' intent. See *Michigan Bell Telephone Co. v. MFS Intelnet of Michigan, Inc.*, No. 5:98 CV 18, __ F. Supp. 2d __, __, 1998 WL 413749, at *4 (W.D. Mich. July 21, 1998) ("[C]onsideration of the statutory scheme demonstrates that permitting state court review of this type of Order would directly contravene the intent of Congress."). In conclusion, this court finds that the ICC's order interpreting the meaning of the reciprocal compensation provision of the Interconnection Agreements constitutes a "determination" under the meaning of the Act that is subject to review in federal court.[3]

B. Eleventh Amendment

The Commissioners claim that Ameritech's suit is barred by the Eleventh Amendment. This court addressed the identical argument in a previous case brought under the Telecommunications Act. *See MCI Telecommunications v. Illinois Bell Telephone Co.*, No. 97 C 2225 *et al.*, 1998 WL 156678 (N.D. Ill. March 31, 1998). Perhaps by way of com-

3 As the Court has found that subject matter jurisdiction is present pursuant to 47 U.S.C. § 252(e)(6), it is not necessary to review the Commissioners' second argument that subject matter jurisdiction was not properly alleged pursuant to 28 U.S.C. § 1331.

mentary on their view of the rationale of that decision, the Commissioners do not even so much as acknowledge it in their motion to dismiss. In their reply brief, it is clear that they intend the instant motion to serve as a motion to reconsider the earlier ruling. This court therefore refers that parties to its earlier decision, which discussed the issue of immunity at length and held that: (1) the state's voluntary participation in the regulatory scheme constituted waiver of Eleventh Amendment Immunity, see *id.*, at *7-8, and, (2) the doctrine of *Ex parte Young* allows the suit against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief, *see id.*, at *13. This court therefore denies the Commissioners' motion to dismiss on the basis of Eleventh Amendment immunity.

C. Res Judicata and Collateral Estoppel

In their second motion to dismiss, the Commissioners argue that Ameritech's suit is barred by the doctrines of res judicata and collateral estoppel. *Res judicata* is a judicial doctrine designed to ensure the finality of judicial decisions. See *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior action. See *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981). There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and, (3) a final judgment on the merits. *See Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar. The Commissioners argues that the elements of claim preclusion are satisfied: the parties are the same, the actions are identical in substance, and the ICC's March 11, 1998 order constitutes a final judgment on the merits.

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980). A federal court applies state collateral estoppel principles in determining whether a state court judicial determination precludes relitigation of an issue. *See Studio Art Theatre v. City of Evansville*, 76 F.3d 128, 130 (7th Cir.), *cert denied*, __ U.S. __, 117 S. Ct. 177 (1996). In determining the preclusive effect of a prior state court judgment, federal courts must look to state law and determine whether another state court would give preclusive effect to the prior proceeding. *Kunzelman v. Thompson*, 799 F.2d 1172, 1176 (7th Cir. 1986). A federal court must give the same preclusive effect to a state court ruling as would a court in the rendering state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984). Under Illinois collateral estoppel principles, four elements must be met for collateral estoppel to apply: "(1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action." *La Preferida, Inc. v. Cerveceria Modelo, S. A. de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990). The Commissioners contend that

all four elements have been satisfied, and that there is "no question" that Ameritech raised and fully litigated before the ICC the issues now presented in its complaint.[4]

This court finds, however, that the doctrines of res judicata and collateral estoppel are inapplicable to the instant case. As previously stated, this court has exclusive juridiction to review determinations made by the ICC interpreting and enforcing interconnection agreements. *See supra* Part III.A. This decision is supported by the Eighth Circuit's recognition that "the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." *Iowa Utilities Board*, 120 F.3d at 904 n. 24. As an appeal from an administrative decision, this court has jurisdiction to review *de novo* the state commissions' interpretation of law. All other issues, including factual findings, are reviewed with substantial deference. See *Illinois Bell Telephone Co.*, No. 98 C 1925, 1998 WL419493, at *2-3. The fact that Congress gave federal courts jurisdiction to review such decisions negates any argument that the state commission's determination must be given preclusive effect. To hold otherwise would controvert the purpose of the Act.

E. Abstention

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4 Counts I through IV of its complaint were decided before the ICC and therefore Ameritech is estopped from relitigating these claims. The Commissioners argue that Count V, a state law claim based on supplemental jurisdiction, would have to be dismissed as well.

Finally, the Commissioners argue that this court should abstain from exercising its jurisdiction under the *Burford* and *Younger* abstention doctrines. "Federal courts have a 'virtually unflagging obligation to exercise the jurisdiction given them.' " *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15, 103 S. Ct. 927, 936 (1983) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S. Ct. 1236, 1244 (1976)). Notwithstanding this obligation, a court may abstain from exercising its jurisdiction in certain, narrowly construed circumstances. The Supreme Court has identified four categories of circumstances in which abstention may be appropriate. *See Colorado River*, 424 U.S. at 814-18, 96 S. Ct. at 1244-46.

1. *Burnford* Doctrine

Under what is commonly referred to as the "Burnford doctrine," where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, 109 S. Ct. 2506, 2514 (1989) (quoting *Colorado River*, 424 U.S. at 814, 96 S. Ct. at 1245).

The Commissioners argue that both of the alternate *Burford* rationales for abstention are satisfied. However, this court finds that neither *Burnford* rationale applies to the instant case. First, the Commissioners have not made any convincing showing that there are difficult questions of state law presented. In fact, Count V is the only count that is brought under state law. The remaining counts were brought under the Telecommunications Act, a *federal* law. Second, the Commissioners have not demonstrated that federal review would be disruptive of state policy. The instant case involves the discrete question of whether calls terminated at Internet Service Providers are local for purposes of the interconnection agreements. The ICC's ruling on this issue was based entirely on the language of the Agreements themselves and federal law. *See Illinois Bell Telephone*, No., 98 C 1925, 1998 WL419493, at *7-8. Therefore, no state policy that will be threatened by federal review.

2. *Younger* Doctrine

Under the *Younger* abstention doctrine, in the absence of extraordinary circumstances, a federal court will not exercise jurisdiction if such exercise would interfere with an ongoing state court criminal prosecution. *Younger v. Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 751 (1971). The *Younger* doctrine requires that a federal court exhibit "comity," that is, a "proper respect for state functions." *Id.* at 44, 91 S. Ct. at 750. Where vital state interests are involved, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore v. Sims*, 442 U.S. 415, 426, 99 S. Ct. 2371, 2379 (1979). Courts considering the application of the *Younger* doctrine should consider three factors "(1) the judicial or judicial in nature state proceedings must be on-

going; (2) the proceedings must implicate important state interests; and (3) there must be an adequate opportunity in the state court proceeding to raise constitutional challenges." *Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996) (citing *Trust & Inv. Advisers, Inc. v. Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994)). The Commissioners argue that all three factors are satisfied because (1) Ameritech's petition for review of the ICC's March 11, 1998 order is currently pending in the Third District Appellate Court; (2) the regulation of telecommunications carriers is an important state interest and matter of substantial public concern; and, (3) Ameritech has an adequate opportunity to raise any federal issues in the ongoing state proceedings.

This court finds that *Younger* abstention is applicable to the instant case because there is no available state remedy for review of the ICC's decision. As this court has explained, under the Telecommunications Act, federal courts provide exclusive review for the decisions of state commissions. *See Michigan Bell*, __ F. Supp.2d at __, 1998 WL 413749, at *8 (finding that abstention does not apply because federal courts have exclusive jurisdiction over plaintiffs' 252(e)(6) claim).

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, the Commissioners' first and second motions to dismiss are DENIED.

Enter:_____
David H. Coar
Federal District Court Judge

Dated: August 25, 1998

APPENDIX E – CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTIONAL PROVISIONS

1. The Supremacy Clause, U.S. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. U.S. Const amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

FROM TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS CHAPTER 5. WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set

forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

* * *

(e) Approval by State Commission. --

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds For Rejection. -- The State commission may only reject --

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that --

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under section (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by

the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in

an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements of Generally Available Terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission --

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

* * *

* * *

(h) Filing Required. -- A State Commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

* * *

Section 601 of the Telecommunications Act of 1996:

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

* * * *

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

ILLINOIS COMPILED STATUTES (1998)
CHAPTER 220. UTILITIES

Article XIII

5/13-514 Prohibited Actions of Telecommunications Carriers

§ 13-514. Prohibited Actions of Telecommunications Carriers. A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:

(1) unreasonably refusing or delaying interconnections or providing inferior connections to another telecommunications carrier;

(2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier;

(3) unreasonably denying a request of another provider for information regarding the technical design and features, geographic coverage, information necessary for the design of equipment and traffic capabilities of the local exchange network except for proprietary information unless such information is subject to a proprietary agreement or protective order;

(4) unreasonably delaying access in connecting another telecommunications carrier to the local exchange network whose product or service requires novel or specialized access requirements;

(5) unreasonably refusing or delaying access by any person to another telecommunications carrier;

(6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;

(7) unreasonably failing to offer services to customers in a local exchange, where a telecommunications carrier is certificated to provide service and has entered into an interconnection agreement for the provision of local exchange telecommunications services, with the intent to delay or impede the ability of the incumbent local exchange telecommunications carrier to provide inter-LATA telecommunications services; and

(8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996[1] in a manner that unreasonably delays or impedes the availability of telecommunications services to consumers.

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1. 47 U.S.C.A § 252

(2) (2)

Nos. 00-878 and 00-92

Supreme Court
FILED
JAN 16 2001

IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

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Rule 29.6 STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.), and MCImetro Access Transmission Services LLC are all wholly owned subsidiaries, directly or indirectly, of WorldCom, Inc. WorldCom, Inc. is a Georgia corporation that is publicly traded on the NASDAQ National Market under the symbol WCOM. No publicly held company owns 10 percent or more of WorldCom, Inc. stock.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Focal Communications Corp. states as follows:

Focal Communications Corporation, through its operating subsidiaries, provides local exchange telecommunications services, including telecommunications services to Internet service providers. Focal Communications Corporation is a Delaware corporation that is publicly traded on the NASDAQ National Market under the symbol FCOM. No publicly held company owns 10 percent or more of the stock of Focal Communications Corporation. There are no subsidiaries or affiliates of Focal Communications Corporation that have issued equity or debt securities to the public.

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MISCELLANEOUS

Stephen Labaton, *Communications Lobby Puts Full-Court Press on Congress*, N.Y. Times, Oct. 24, 2000 17

STATEMENT

Respondents WorldCom Technologies, Inc. ("WorldCom"), MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, Inc., and Focal Communications Corporation (collectively the "Carriers") submit this brief in opposition to the petitions for certiorari filed by the members of the Illinois Commerce Commission (referred to collectively with the Commission as "ICC") and Illinois Bell Telephone Company ("Ameritech"). Those petitions attack the same Seventh Circuit ruling from diametrically opposed points of view. As we show, the Seventh Circuit adopted a correct intermediate position that is not in conflict with any decision of any other circuit and does not warrant review by this Court.

1. Statutory Scheme

Ameritech filed this case in federal court seeking review of the ICC's order enforcing "interconnection agreements" that the Carriers and Ameritech had entered into as provided in the Telecommunications Act of 1996 (the "Act" or "1996 Act"). [1] Such agreements are a key feature of the system set up by the 1996 Act to promote competition in the local telephone market by requiring each incumbent local telephone company, such as Ameritech, to interconnect and "share its network with competitors." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *see* 47 U.S.C. § 251(c)(2)(A). Under the Act, new entrants and incumbents first attempt to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If they cannot

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[1] At the same time it filed in the district court, Ameritech also filed a parallel action in the Illinois Appellate Court. The Illinois Appellate Court stayed that action at Ameritech's request pending resolution of this case. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 3-98-0393, Order Granting Stay (Ill. App. Ct. June 17, 1998). The stay remains in effect.

agree, the governing state commission is authorized, but not required, to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). The results of the negotiation and arbitration process are memorialized in an interconnection agreement, which must be submitted for approval to the state commission. *Id.* § 252(e).

Although the Act supplies minimum requirements that govern arbitrated provisions, parties may negotiate terms "without regard" to them. *Id.* § 252(a)(1). When parties voluntarily agree to terms, a state commission may reject the agreement only if it is discriminatory or against the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A); *see also AT&T Corp.*, 525 U.S. at 371-73.

Through this statutory scheme, Congress altered the balance between federal and state authority in the area of local telecommunications competition. The 1996 Act partially supplants the existing system of exclusive state regulation, and imposes a new set of federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *See* 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with authority to implement the federal standards created by the Act. *Id.* at 377-84 & n.5; 47 U.S.C. § 201(b). But Congress also carved out a new, voluntary role for state commissions that choose to oversee interconnection agreements. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If a state commission elects to

participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6). If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *Id.*; *see* 28 U.S.C. § 2342(1).

2. Nature of the Dispute

This case concerns "reciprocal compensation," which is the payment that a local carrier receives for completing a call for another local carrier. With local competition, customers of one local carrier will call customers of another. Carriers must therefore assist each other in delivering calls. When a customer of one carrier makes a local call to a customer of another, only the caller pays its carrier for the telephone services, leaving the other carrier uncompensated. The caller's local carrier therefore must compensate the other carrier whose facilities are used to complete the call. *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701; Am. Pet. App. 3a.

The specific issue in this case is the proper treatment of calls by customers of the Carriers and Ameritech to other local customers operating as "Internet Service Providers" (ISPs). These calls are treated for purposes of billing customers like any other local call. Am. Pet. App. 4a. Ameritech and the Carriers also routinely charged each other reciprocal compensation for terminating ISP calls placed by each others' customers. *Id.* at 82a-83a. In July 1997, however, Ameritech announced that it was unilaterally stopping reciprocal compensation payments for calls to local ISPs, claiming for the first time that such calls are not "Local Traffic." *Id.* at 4a. In response, the Carriers asked the ICC to enforce the agreements

by requiring Ameritech to resume payments of reciprocal compensation for ISP calls. *Id.* at 4a-5a. The ICC held an evidentiary hearing on November 21, 1997. *Id.* at 65a. On March 11, 1998, the ICC ruled that the plain language of the agreements, industry custom and practice, and Ameritech's own conduct mandated payment of reciprocal compensation for calls to ISPs. *Id.* at 5a, 76a-83a.

3. District Court Proceedings

On March 27, 1998, Ameritech filed suit in the district court under section 252(e)(6) against the Carriers and the ICC challenging the ICC's determination. Ameritech alleged that the ICC's interpretation of the interconnection agreements violated federal law, arguing that the FCC had determined as a matter of federal law that calls to ISPs are not local. After briefing by the parties, the court rejected the ICC's arguments that the court lacked jurisdiction and that the ICC was immune from suit under the Eleventh Amendment. *Id.* at 52a. But the court ruled against Ameritech on the merits, holding that the ICC's interpretation of the agreements did not violate federal law. *Id.* at 49a, 50a.

4. The Seventh Circuit's Decision

Ameritech and the ICC appealed to the Seventh Circuit. The court of appeals rejected the ICC's immunity claim based on its prior decision in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) ("*MCI-I*"), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000) ("*MCI-II*"), *petition for certiorari filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (Nos. 00-653, 00-744). Am. Pet. App. 6a. Reviewing the text of section 252(e)(6), the court also rejected the ICC's jurisdictional argument and found that "Congress

envisioned suits reviewing 'actions' by state commissions" for compliance with sections 251 and 252 of the Act. *Id.* at 8a.

But the Seventh Circuit also determined that a federal court's scope of review under section 252(e)(6) is limited. Because the plain text of section 252(e)(6) confines review to the question of compliance with sections 251 and 252, the court held that a court's task under section 252(e)(6) is "to examine the [state commission's] order, not to determine whether the [commission] correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation." *Id.* at 11a. Thus, the Seventh Circuit explained, section 252(e)(6) provided no basis for the court to "review [the ICC's] actions for compliance with state law." *Id.* at 8a. Accordingly, the Seventh Circuit found that Ameritech's appeal presented a "narrow issue on the merits: whether a decision of the [ICC] regarding reciprocal compensation for telephone connections to [ISPs] violates federal law." *Id.* at 2a. Reviewing the Act and the relevant FCC precedent, the Seventh Circuit concluded that "nothing in what the ICC said violates federal law in existence at this time." *Id.* at 15a.

Both Ameritech and the ICC filed rehearing petitions, raising essentially the same issues they raise here. In an initial response to Ameritech's petition, the Seventh Circuit amended its decision on August 18, 1999. It added language stating that "[s]ection 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision 'interpreting' an agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* at 17a.

The rehearing petitions were held in abeyance for about a year, pending the Seventh Circuit's reconsideration of its Eleventh Amendment ruling in *MCI-I*. The Seventh Circuit ultimately issued a revised opinion in *MCI-II* reaffirming its ruling that state commissions do not have Eleventh Amendment immunity in actions brought under section 252 of the Act. It then denied the rehearing petitions in the instant case on August 9, 2000. *Id.* at 18a-19a.

REASONS FOR DENYING THE PETITIONS

The issues raised by the petitioners do not warrant this Court's review for three reasons.

First, there is no genuine division among the circuits as to any of the issues raised by the petitioners. Four circuits (the Fifth, Seventh, Eighth, and Tenth) have all held that a federal court does have jurisdiction under section 252(e)(6) to consider whether a state commission violated federal law in a ruling *enforcing* a previously approved interconnection agreement. At least three (the Fifth, Seventh, and Tenth) have agreed that a claim like Ameritech's in this case – that a state commission's enforcement order was based on a misinterpretation of the language of an interconnection agreement – raises issues of *state* law. Contrary to Ameritech's argument, no other circuit disagrees. Finally, as to the Eleventh Amendment issue raised by the ICC, all three circuits to have addressed the issue (the Sixth, Seventh, and Tenth) have held that state commissions are not immune from federal lawsuits brought under section 252(e)(6) claiming that the state commission violated federal law.

Second, even if there were "disarray" in the decisions of the circuits in this area, it would still make sense to defer

addressing the issues raised by the petitions. Those same issues are presented in cases currently pending in the Fourth, Sixth, and Eleventh Circuits. At the same time, relevant issues concerning reciprocal compensation for calls to ISPs are reportedly the subject of impending federal agency and potential legislative action, either of which could substantially limit the precedential value of any decision this Court might issue. There is no compelling reason for this Court to grant certiorari now when these issues are still making their way through all three branches of government. Ameritech will suffer no prejudice from having to pursue its existing contract claim in state court.

Third, the Seventh Circuit correctly resolved each of the issues raised by petitioners. There is no reason to think that Congress gave the federal courts *exclusive* jurisdiction over cases challenging state commission decisions to approve or reject interconnection agreements, *see* 47 U.S.C. § 252(e)(4), but denied the same courts the authority to review state commission enforcement actions for compliance with federal law. On the other hand, the Seventh Circuit appropriately recognized that a challenge to a state commission's interpretation of the language of an interconnection agreement raises issues of state law. Indeed, this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 22-23 (1982), compels that conclusion. Finally, the Seventh Circuit broke no new ground in applying the doctrines of waiver and *Ex parte Young* to preclude the ICC from invoking Eleventh Amendment immunity as to the purely federal claims Ameritech raised, and the Seventh Circuit resolved.

I. There Is No Genuine Circuit Split on Any of the Issues the Petitioners Raise.

A. The circuits agree that section 252(e)(6) applies to review of "enforcement decisions."

The ICC asserts that this Court's review is necessary to correct the Seventh Circuit's purportedly incorrect conclusion that section 252(e)(6) of the 1996 Act extends to review of state commission decisions interpreting or enforcing interconnection agreements. ICC Pet. at 12-18. The ICC argues that section 252(e)(6) only confers federal jurisdiction to review state commission determinations approving or rejecting interconnection agreements. *Id.*

No circuit split exists on this issue. Three other circuits have considered this very issue in practically identical cases and have agreed with the Seventh Circuit's conclusion that section 252(e)(6) confers jurisdiction to review state commission determinations in the "enforcement" stage as well as the "approval" stage. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, No. 99-5222, ___ F.3d ___, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Pub. Utils. Comm'n of Tex.*, 208 F.3d 475, 480 (5th Cir. 2000). No circuit has ruled to the contrary.

B. The circuits agree that interpretation of an interconnection agreement is primarily a question of state law.

Taking a view directly opposite that of the ICC, Ameritech contends that *all* questions relating to the interpretation and enforcement of an interconnection agreement are federal

questions cognizable in federal court pursuant to section 252(e)(6). But here again there is no circuit split on this issue. Ameritech's fundamental claim is that federal law governs all aspects of the question of "[w]hether a . . . state commission determination concerning the rights and obligations of the parties to a section 252 agreement deviated from the plain terms of the agreement." Am. Pet. at i. In addition to the Seventh Circuit, both the Tenth and the Fifth Circuits have rejected that argument in nearly identical cases. *Brooks Fiber*, 2000 WL 1827576, at *4; *Southwestern Bell*, 208 F.3d at 485; *see also Puerto Rico Tel. Co. v. Telecommunications Regulatory Board of Puerto Rico*, 189 F.3d 13 (1st Cir. 1999). No circuit has ruled otherwise.

Ameritech attempts to establish a circuit split by pointing to a different aspect of the Fifth Circuit's ruling – its authorization of federal court review of *state* law claims. Am. Pet. at 13, 17-19.[2] But even if that purported circuit split existed, it would have no relevance to this case, where Ameritech has consistently argued that it can pursue its claim of misinterpretation of the agreement in federal court because it is a *federal* claim. The Fifth Circuit itself expressly *rejected* that argument. *Southwestern Bell*, 208 F.3d at 484.

Nor is there a genuine conflict among the circuits even as to the question whether a federal court can entertain state law

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[2] The Fifth Circuit mistakenly read two cases, *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), and *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999), to support its conclusion that federal courts may review questions of state law. In fact, neither case considered any issue of state law, but held only that federal courts should consider questions of federal law de novo and factual determinations under an arbitrary and capricious standard. *US West*, 193 F.3d at 1117; *GTE South*, 199 F.3d at 745.

challenges to a commission's order enforcing an interconnection agreement. As the Tenth Circuit recently explained, the Fifth Circuit is properly understood as having endorsed the exercise of supplemental jurisdiction under 28 U.S.C. § 1367 to reach the state law claims. *Brooks Fiber*, 2000 WL 1827576, at * 4 (citing *Southwestern Bell*, 208 F.3d at 482). The Tenth Circuit itself took the same approach. *Id.* Nothing in the Seventh Circuit's decision in this case would preclude reliance on supplemental jurisdiction to reach state law claims in appropriate cases.

To the contrary, while the Seventh Circuit did seem to contemplate that in the usual case federal issues would be litigated in federal court and state issues would be litigated in state court, Am. Pet. App. 17a, it did not discuss supplemental jurisdiction. Nor was there any reason to do so, since Ameritech never invoked the court's supplemental jurisdiction – insisting instead that it was presenting only federal claims cognizable under section 252(e)(6).

Moreover, the Seventh Circuit's conception of how review would usually proceed was obviously influenced by a factor not present in the Fifth and Tenth Circuit cases – an assertion of Eleventh Amendment immunity by the defendant state commission. While state commissions do not have Eleventh Amendment immunity from federal claims brought under section 252(e)(6), *see* pp. 24-29 *infra*, they still may invoke Eleventh Amendment immunity as to state law claims. As to the latter, the *Ex parte Young* doctrine does not apply, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), and the argument for a finding of waiver of

immunity is also much more problematic.[3] Given these realities, in a case where a state chooses to assert its immunity, it is very likely that state claims will have to be brought in state court, as the Seventh Circuit noted. But the Seventh Circuit's acceptance of this forced bifurcation of the case does not conflict with anything in the Fifth or Tenth Circuit decisions. Nor should it be a surprise to this Court, which recognized in *Pennhurst* that bifurcation of a case involving both state and federal issues may be a necessary consequence of the Eleventh Amendment. *Id.* at 121-23.

In another attempt to manufacture a circuit conflict, Ameritech contends that the Eighth and Fourth Circuits and the FCC also have reached conclusions that diverge from the Seventh Circuit's analysis. *See* Am. Pet. at 13-23. These arguments are equally unavailing.

The Eighth Circuit in *Southwestern Bell Telephone Co. v. Connect Communications Corp.* simply held that Southwestern Bell's claim that a state commission determination "violated federal law" was sufficient to confer subject matter jurisdiction to consider "that claim on the merits." 225 F.3d at 948. The Eighth Circuit determined that the claims in that case raised a number of federal issues over which the court could assert jurisdiction. *Id.* But the Eighth Circuit did not agree with Ameritech that interpretation of an interconnection agreement is an inherently federal question, nor did it dispute the other

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[3] The clear and unequivocal notice to states that their actions will be subject to federal court review under section 252(e)(6) does not appear to extend to state law issues, because that section only refers to actions in federal court to determine whether the state commission's determination "meets the requirements" of sections 251 and 252. A lack of clear notice would preclude a finding of waiver of immunity as to state law issues. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985).

courts' view of the role of state law in this area. Rather, the Eighth Circuit agreed that federal courts are to ensure only "compliance with federal law" and "[w]ith regard to purely state law issues, the state commissions may have the final say." *Id.*

The Fourth Circuit's decision in *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 229 F.3d 457 (4th Cir. 2000), likewise fails to provide grounds for certiorari. That case was factually distinct from this one in that it did not involve a challenge to a state commission decision interpreting or enforcing an interconnection agreement. Rather, it was a challenge at the approval stage. Further, the court did not purport to examine the appropriate scope of review under section 252(e)(6). Instead, it relied on the "inherent power of the court" to order a district court to consider reforming a negotiated interconnection agreement provision that was intimately related to an arbitrated provision after FCC and court decisions established the invalidity of that arbitrated provision. *Id.* at 466 n.4. The court cited equitable considerations for its actions: the provision at issue was negotiated at a time when applicable federal regulations specifically required such a provision, but those regulations were later invalidated, and *an arbitrated* provision intimately related to the negotiated provision at issue had been invalidated based on a separate change in federal law. *Id.* at 464-65; *see also AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 661, 670 & n.4 (E.D.N.C. 1998). None of those considerations

apply here. The Fourth Circuit did not even consider – much less disagree with – the Seventh Circuit's decision.[4]

Ameritech's reliance on the FCC's decision in *In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11227 (2000) ("*Starpower*"), is also misplaced. Ameritech claims that the FCC determined in *Starpower* that "any regulatory determination under section 252, whether by a state commission or by the FCC, interpreting an interconnection agreement presents a question of federal law that is reviewable in federal court." Am. Pet. 20. But the FCC in *Starpower* found that if state commissions refuse to interpret and enforce interconnection agreements, the FCC would undertake that duty pursuant to section 252(e)(5). *Starpower* says *nothing* about judicial review of state commission determinations or the law that governs interpretation of interconnection agreements. The order's only sentence regarding judicial review concerns review of *FCC* proceedings, and provides that "findings made by the [FCC] . . . and any judicial review of such findings shall be the exclusive remedies available to the parties." *Starpower* ¶ 9. That is a simple restatement of part of section 252(e)(6) that provides for review of FCC decisions, which must be in the Hobbs Act court. 47 U.S.C. § 252(e)(6). An *entirely separate* portion of section 252(e)(6) governs state commission review, and that is the provision at issue in this case. *Id.* Further, that the FCC is considering the contract issues in *Starpower* does not federalize them. Federal agencies routinely apply state law, subject to federal court review. *See, e.g., Nicor Exploration Co. v. FERC*,

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[4] As noted *infra*, the Fourth Circuit currently has under advisement two cases that much more closely resemble the instant case.

50 F.3d 1341, 1347-49 (5th Cir. 1995). While review of state commission decisions is limited to ensuring that any determination "meets the requirements of [s]ections 251 and [252]," that limitation does not apply to review of FCC decisions. 47 U.S.C. § 252(e)(6).

C. The circuits agree that state commission defendants are not immune from section 252(e)(6) actions under the Eleventh Amendment.

As for the Eleventh Amendment issues raised by the ICC, there is again no circuit conflict. Three circuits, including the Seventh, now have held that a case like this one is a "straightforward *Ex parte Young* case" that may be brought in federal court against the members of a state commission. *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000); *see MCI-II*, *supra*; *MCI Telecommunication Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939-40 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-593).[5] This prevailing consensus is reflected in the fact that the

[5] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to section 252(e)(6). *See, e.g., Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d. 1279 (N.D. Fla. 1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998).

Court has twice denied review on this very question during this Term.[6]

The ICC claims that there is a circuit conflict as to one of the alternate bases for rejecting the Eleventh Amendment defense that the Seventh Circuit has also embraced – waiver. But here again, the Tenth Circuit – the only other court of appeals to have addressed the question – is in full agreement with the Seventh Circuit. *See MCI Telecommunications Corp.*, 216 F.3d at 938.[7] The ICC cites *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), as supporting its position on waiver. ICC Pet. at 20. But the only reference to waiver of Eleventh Amendment immunity in that case is pure dicta in a footnote. 209 F.3d 922, n.6. The state commission, as a corporate entity, was not even a defendant in the case and the Sixth Circuit did not reach waiver because *Ex parte Young* applied.

[6] *See Strand v. Michigan Bell Tel.*, 121 S. Ct. 54 (2000); *Strand v. Verizon North, Inc.*, 121 S. Ct. 380 (2000).

[7] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states voluntarily waive their sovereign immunity when they willfully participate in the Act's regulatory scheme. *See, e.g., Michigan Bell Tel. Co. v. Climax Tel. Co.*, 2000 U.S. Dist. LEXIS 15195 (W.D. Mich. Oct. 12, 2000); *GTE California, Inc. v. California Telecommunications Coalition*, Nos. C 99-03973 CW *et al.*, slip op. at 28-35 (N.D. Cal. Aug. 31, 2000); *Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc., 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998).

II. The Issues Presented by the Petitions Are Still Developing in Other Circuits, the FCC, and Congress.

The Court should not grant review for the additional reason that the issues petitioners raise are pending and soon to be addressed in several additional circuits. Further, the FCC and Congress may act soon on issues pertaining to reciprocal compensation and those actions may severely limit the importance of any decision this Court might issue. It therefore makes sense for the Court to stay its hand at this time.

Cases closely resembling the Seventh Circuit's ruling at issue here are pending in the Fourth, Sixth, and Eleventh Circuits. *See BellSouth Telecommunications, Inc. v. North Carolina Utils. Comm'n*, No. 99-1845(L) (4th Cir.); *Bell Atlantic-Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, No. 99-2459 (4th Cir.); *Michigan Bell Tel. Co. v. MFS Intelenet*, No. 99-1996 (6th Cir.); *BellSouth Telecommunications, Inc. v. WorldCom Techs.*, Nos. 00-12809 (11th Cir.); *BellSouth Telecommunications, Inc. v. ITC DeltaCom*, No. 99-14728 (11th Cir.). Similar cases are pending in district courts within the First, Eighth and Ninth Circuits.

Especially given the absence of a circuit conflict, there is every reason to allow the questions presented here to be addressed in the first instance by these other circuits. Doing so would allow the relevant arguments and considerations to be further elaborated, and if no significant disagreement among the circuits emerges, there may never be need for this Court to undertake a review.

In addition, at the heart of Ameritech's claims is its assertion that federal law does not affirmatively require

reciprocal compensation for calls to ISPs. While the Carriers submit that this question is irrelevant, impending action by the FCC may moot Ameritech's claims altogether. The FCC is currently addressing whether the Act requires reciprocal compensation for calls to ISPs in remand proceedings resulting from *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). There, the D.C. Circuit vacated for want of reasoned decision making a prior FCC order concluding that the Act does not mandate reciprocal compensation for calls to ISPs. *Id.* at 3, 9. Should the FCC conclude that the Act does mandate this compensation, as the D.C. Circuit strongly suggested, Ameritech's claims would be moot. At a minimum, it makes little sense for this Court to grant review before the FCC and the D.C. Circuit have settled on the federal rule regarding reciprocal compensation for calls to ISPs.[8]

Finally, Ameritech's claim of urgency is unfounded. *See* Am. Pet. at 28-30. Ameritech will suffer no prejudice should the Court agree that this issue should work its way through the courts before granting certiorari. At the same time as it instituted this case in 1998, Ameritech separately filed a state court appeal in Illinois to challenge the ICC's order. *See* note 1 *supra*. That case has been stayed pending resolution of Ameritech's petition and will be returned to active status upon close of these federal proceedings. Thus, should this Court deny Ameritech's petition, proceedings in that state court action will commence and Ameritech will have a full opportunity to

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[8] Moreover, legislation proposed at the end of the last session would have addressed the question whether federal law should mandate or prohibit reciprocal compensation for calls to ISPs. *See* Reciprocal Compensation Adjustment Act of 2000, H.R. 4445, 106th Cong. (2000); Stephen Labaton, *Communications Lobby Puts Full-Court Press on Congress*, N.Y. Times, Oct. 24, 2000, at A1. This Court should not enter the fray when legislative initiatives are impending.

voice again any state law claim that the ICC misinterpreted the contracts.

III. The Seventh Circuit's Decision Is Correct.

Petitioners' arguments for review are also unpersuasive because the Seventh Circuit's ruling is correct.

A. Section 252(e)(6) applies to review of state commission "enforcement" determinations.

The Seventh Circuit did not err in holding that section 252(e)(6) provides federal jurisdiction to review a state commission order interpreting and enforcing an existing interconnection agreement. That provision states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [sections 251 and 252 of the Act.]

47 U.S.C. § 252(e)(6). As four circuits have recognized, *see* p. 8 *supra*, it would make no sense to read this language as applying only to commission orders approving or rejecting interconnection agreements. To the contrary, when read in context and in light of the Act's structure and purpose, section 252(e)(6) is properly understood as providing that "[i]n any case in which a State commission makes a determination" about the meaning of an existing (*i.e.*, previously approved) interconnection agreement, a "party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement," as now

construed by the commission, "meets the requirements of section 251 [and 252]." 47 U.S.C. § 252(e)(6).

In attempting to ascertain legislative intent, courts do not "look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law." *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856) (internal quotation marks omitted)). Here, that means that section 252(e)(6) should be read in light of Congress's creation of a "new federal regime" that "fundamentally restructures local telephone markets." *AT&T Corp.*, 525 U.S. at 371, 378 n.6. This jurisdictional provision is an essential component of the new federal regime because it assures that state commission compliance with the Act will be assessed by federal courts, which can elaborate a uniform federal interpretation. As this Court has emphasized in discussing the Act: "The appeals . . . to what might loosely be called 'States' rights' are most peculiar, since there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.* at 378 n.6.

It would have been particularly anomalous for Congress to have provided that federal courts have *exclusive* jurisdiction to review state commission orders approving interconnection agreements, while simultaneously not intending that federal courts entertain challenges to enforcement orders as violative of the Act. The ICC argues that the phrase "under this section" limits section 252(e)(6) to *approval* determinations, because those are the only determinations a commission makes "under" section 252. ICC Pet. at 12. But the ICC expressly invoked jurisdiction under the 1996 Act in adjudicating this dispute. Am. Pet. App. 77a, 84a. Thus, approval and later

enforcement/interpretation determinations are, in every practical sense, made "under" section 252, which is the key provision authorizing state commissions to play a role in this field.

In any event, this debate is largely academic. Even if the Court were to disagree with the circuit courts and interpret section 252(e)(6) not to confer jurisdiction on federal courts, then jurisdiction under 28 U.S.C. § 1331, in combination with 42 U.S.C. § 1983, would authorize parties to bring to federal court claims that state commission enforcement decisions had violated federal law. *See Strand*, 209 F.3d at 915-19; *Puerto Rico Tel. Co.*, 189 F.3d at 16; *see also City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 166-68 (1997) (recognizing that there is federal jurisdiction to review state administrative agency decisions where the party formulates an appropriate federal claim).

B. Section 252(e)(6) does not authorize review of state law claims.

The Seventh Circuit similarly was correct in concluding that section 252(e)(6) provides solely for review of federal claims. The statute's plain language compels that conclusion. Section 252(e)(6) authorizes a federal court to assess only whether a state commission's determination "meets the requirements of section 251 . . . and this section [252]" of the 1996 Act. 47 U.S.C. § 252(e)(6). As the First Circuit explained, "[i]f Congress intended federal courts' review to encompass any kind of alleged flaw in a state commission's determination, then there would have been little need to include the language 'meets the requirements of section 251 and . . . [section 252].'" *Puerto Rico Tel. Co.*, 189 F.3d at 14.

Ameritech insists that the bifurcated system resulting from the Seventh Circuit's view of section 252(e)(6) "make[s] no sense" because Congress should have "requir[ed] at least as much federal oversight" of state commission decisions as FCC decisions in order to "secure national uniformity". Am. Pet. 21-22. But section 252(e)(6) *does* provide federal court review for all questions of federal law arising from the determinations of state commissions and the FCC. For questions of state law contract interpretation, Ameritech's uniformity concern does not apply. Moreover, as noted above, this Court recognized in *Pennhurst* that the need to accommodate both federal and state interests could lead to bifurcated systems of review. 465 U.S. at 121-23.

Finally, Ameritech raises the specter of "grave Article III concerns." Am. Pet. at 16. It argues that if its state law challenge to the ICC's contract interpretation is successful, the Seventh Circuit's previous analysis of whether the ICC's determination violates federal law would be moot. But under section 252(e)(6), the test is whether the *state commission's* determination violated federal law, as the Seventh Circuit recognized. The answer to that question depends on the state commission's ruling, not hypothetical subsequent state court proceedings.

C. The Seventh Circuit correctly denied Ameritech's challenge to the ICC's orders.

The Seventh Circuit also was correct in rejecting Ameritech's argument that the ICC's alleged misinterpretation of the interconnection agreements as requiring reciprocal compensation for ISP calls was itself a violation of *federal* law. Ameritech raises two basic arguments in its attempt to federalize a breach of contract claim. First, it argues that

because interconnection agreements are required by the Act, and the Act imposes minimum requirements that apply unless the parties agree otherwise, the interpretation and enforcement of the agreements is inherently a federal issue.

This argument fails under the well-established rule that merely because Congress requires a contract by statute does not mean that every question regarding the interpretation of such a contract is a question of federal law. *Jackson Transit Auth.*, 457 U.S. at 22-23. The interpretation of contractual terms raises a question of federal law *only* if the provision at issue demonstrates that Congress plainly intended that "the rights and duties contained in [such a] contract [are] federal in nature." *Id.* at 23.

Ameritech's theory ignores *Jackson* and would require federal courts to fashion a federal common law of interconnection agreement interpretation. But federal courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Only in a "few and restricted" cases, "where there is a significant conflict between some federal policy or interest and the use of state law" should a court contemplate creating federal common law. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotations and citations omitted). Even when dealing with a comprehensive federal statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Nothing in the 1996 Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement term into a federal question. To the contrary, Congress expressly provided that "this Act . . . shall

not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, Title V, § 601(c), 110 Stat. 43. Congress also expressly authorized states to impose in interconnection agreements pro-competitive state-law requirements that are consistent with the Act. 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c). Obviously, Congress did not intend to preempt all state law.

Second, Ameritech argues that interconnection agreements are not "agreements" at all, but instead constitute "regulatory vehicles" that merely incorporate federal law requirements. Am Pet. at 23. If this were so, however, there would be no need for these elaborate interconnection agreements at all. Congress could have simply provided that incumbents must comply with the minimum requirements of federal law. As the Seventh and Fifth Circuits have recognized, it did not do so. "The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out." Am. Pet. App. 12a (quoted in *Southwestern Bell*, 208 F.3d at 484-85).

Moreover, as Ameritech acknowledges, the Act itself provides that parties may "enter into a binding agreement . . . *without regard to the standards* set forth in" the Act. 47 U.S.C. § 252(a)(1) (emphasis added). Had Congress intended negotiated agreements to be governed exclusively by federal law, it would not have allowed parties to enter into them "without regard" to the Act's requirements.

In any event, even if the contract interpretation issue could be reached in this federal action, the ICC correctly interpreted the agreements' terms to require reciprocal compensation for calls to ISPs. Am. Pet. App. 10a-15a. Considered in light of

the custom and practice of the telecommunications industry, the agreements' terms demonstrate that Ameritech agreed to pay reciprocal compensation for calls to ISPs. *Id.* The ICC even applied factors that directly parallel those that the FCC suggested state commissions may consider when determining whether parties agreed to pay reciprocal compensation for calls to ISPs. *Id.* at 14a; *see In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP Bound Traffic*, 14 F.C.C.R. 3689, ¶ 24 (1999); *Starpower* ¶ 9. The ICC's decision is consistent with the decisions of four circuit courts, six federal district courts and over thirty state commissions. No court has held to the contrary.

D. The ICC does not have Eleventh Amendment immunity as to Ameritech's federal claims.

The Seventh Circuit's holding that the ICC defendants are not immune from a federal suit brought pursuant to section 252(e)(6) is firmly grounded in this Court's Eleventh Amendment jurisprudence. Consistent with *Ex parte Young*, the Act permits aggrieved parties to seek review of state commission determinations in federal court. The Act erects no limits on the equitable powers that federal courts have at their disposal to ensure that the state commissioners' actions comply with the Act's requirements. Moreover, in the spirit of cooperative federalism, Congress intended to encourage the participation of states in the regulation of interconnection matters addressed in the Act. Accordingly, the Act subjects any determination regarding interconnection agreements made by a state commission to review in federal court for compliance with federal law. Illinois' decision to accept Congress' invitation to regulate pursuant to the Act – a responsibility it

does not have to assume – constitutes a waiver of its Eleventh Amendment immunity within the meaning of *College Savings*.

1. *Ex parte Young* applies here.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials seeking prospective relief from ongoing violations of federal law is not treated as implicating a state's immunity under the Eleventh Amendment. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 294 (1997) (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

Although the ICC argues otherwise, ICC Pet. at 28-29, these requirements are plainly satisfied here. As the Seventh Circuit put it in *MCI-II*, the "challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine." 222 F.3d at 345.

The ICC petitioners also argue that *Ex parte Young* applies *only* in constitutional cases. ICC Pet. at 24-28. But that argument completely misapprehends the *Ex parte Young* doctrine and this Court's holdings. *See, e.g. Coeur d'Alene*, 521 U.S. at 270 (*Ex parte Young* actions exist "to ensure the supremacy of federal statutory and constitutional law"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-74 (1996) (reaffirming that a proper *Ex parte Young* suit is one that seeks to challenge the "continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (barring suit in statutory case only to the extent plaintiffs sought

retrospective relief). The Court has never limited the doctrine in the manner petitioners imagine. Indeed, the Court has repeated that the *Ex parte Young* doctrine is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp.*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. at 160).

Finally, the ICC petitioners attempt to rely on *Seminole Tribe*, where the Court held that the inclusion of an express and very limited set of judicial remedies in a statute impliedly precluded reliance on *Ex parte Young*. ICC Pet. at 21-24. But there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. 47 U.S.C. § 252(e)(6). That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it barred enforcement of those orders through contempt sanctions. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available under IGRA and an *Ex parte Young* action, where the typical remedy is an enforceable injunction.

There is nothing in section 252 that would limit federal court review in a remotely comparable manner. In fact, allowing *Ex parte Young* suits to proceed pursuant to section 252(e) realizes Congress's intent to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).[9]

In sum, it is hard to imagine a statutory remedy more synonymous with *Ex parte Young* than that provided by Congress here. Certainly the fact that the statute refers

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[9] *Seminole Tribe* also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the state." Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. Moreover, the term "state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. 47 U.S.C. § 153(41). Contrary to petitioners' claims, *see* ICC Pet. at 22-23, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

expressly to a federal cause of action cannot, without more, preclude reliance on *Ex parte Young*. That would flout, rather than vindicate, the intent of Congress.

2. A state's waiver of immunity obtained through its voluntary participation in the Act's regulatory scheme is consistent with *College Savings*.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that such a waiver must be clear and voluntary. 527 U.S. 666, 679 (1999); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing state conduct to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal Ry. Co. of Ala. State Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court held that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.")

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it stated that states do validly waive immunity when they knowingly accept a

gratuitous federal benefit expressly tied to a waiver. The Court illustrated this point by distinguishing two important cases in which statutory conditions placed on states by Congress were upheld although waiver was not formally declared by the states. *Id.* at 686-87. The Court recognized that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which [it] assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that *South Dakota v. Dole*, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their Eleventh Amendment immunity in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687.

These principles were appropriately applied by the Seventh Circuit here, where Congress created a set of federal standards and procedures applicable to local interconnection of competing carriers, and then offered states the "gratuitous" opportunity to participate in the new federal scheme, conditioned on the quite reasonable requirement that the state commissions' actions be reviewable for compliance with federal law in federal court. Thus, even if *Ex parte Young* were not available as a vehicle to allow federal court review of state

commission actions, the Eleventh Amendment would not apply because it is waived when states choose to participate in the review and enforcement of interconnection agreements.

CONCLUSION

For the reasons set forth above, both petitions should be denied.

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In the Supreme Court of the United States

RICHARD L. MATHIAS, ET AL.,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a "determination under [section 252]" and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6).

2. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Illinois Bell Telephone Company. d/b/a Ameritech Illinois ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications Inc.

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BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

STATEMENT

A. Federally Mandated Interconnection "Agreements" Under The Telecommunications Act of 1996. This case arises under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). The 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets" and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6, 397 (1999). As Justice Scalia's opinion for the Court explained, "the question" under the Act "is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*" *Id.* at 378 n.6 (emphasis added).

The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Sections 251 and 252 of the Act govern the formation and content of "interconnection agreements," which are the federally mandated means of implementing the local competition provisions of the Act. Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. If private parties are unable to reach agreement after arms-length negotiations, they simply can walk away from the bargaining table. Under the Act, however, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected

incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Upon receiving a request for interconnection from a competing LEC, an incumbent LEC, like Ameritech, "may negotiate and enter into a binding agreement" with the requesting carrier. 47 U.S.C. § 252(a)(1). If, however, the incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include those purported requirements in a so-called "agreement." An incumbent LEC may not escape the obligation to enter into section 252 agreements, even if such agreements would be illegal under state law. Moreover, under section 252(i) of the Act, the terms and conditions that are incorporated into a particular agreement must be made available to any other carrier that requests them. 47 U.S.C. § 252(i). In short, the Act sets forth a detailed substantive and procedural framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs, and section 252 interconnection "agreements" are the regulatory vehicles for implementing this Congressional compulsion.

B. The Process For Entering Into A Section 252 Interconnection Agreement. Section 252 of the Act prescribes the process through which a competing LEC may arrive at an agreement with an incumbent LEC for the performance of the duties established in section 251. The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. At every stage of the process, federal law sets the pertinent standards. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach

an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the interconnection agreement. 47 U.S.C. § 252(b)(1).

In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the Federal Communications Commission's ("FCC") rules implementing it. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Although a state commission may impose the requirements of the Act upon an incumbent when the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously approved "binding" agreement, *id.* § 252(a)(1).

Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2). And any post-approval "dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" also lies within "the states' 'responsibility' under section 252" of the Act. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC No. 00-216, ¶ 6 (rel. June 14, 2000) ("*Starpower*"). As the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements are often the principal mechanism for establishing the substance of the parties' obligations under

the 1996 Act." Brief for the United States and the FCC as Intervenors in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 19 (8th Cir. filed Mar. 22, 2000).

As the foregoing demonstrates, state regulators who participate in the federal scheme are not simply "allowed to do their own thing" (*AT&T Corp.*, 525 U.S. at 378 n.6); rather, they "must hew" to the lines drawn by the Act, the federal courts, and the FCC. *Id.* The mechanism for ensuring that state regulators comply with the Act is 47 U.S.C. § 252(e)(6). After the state regulators make a determination with respect to the rights and obligations of the parties, section 252(e)(6) authorizes "any party aggrieved" by a "determination" under section 252 to bring an action in "Federal district court" to determine whether the final agreement "meets the requirements of" sections 251 and 252.

Because Congress may not commandeer state commission participation in the Act's federal regulatory scheme, the Act provides a parallel regulatory scheme pursuant to which the FCC performs the regulatory tasks in the place of non-participating state regulators. If state regulators choose not to accept their "role" as "'deputized' federal regulator[s]" (*MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000), petitions for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653), 69 U.S.L.W. 3346 (U.S. Nov. 6, 2000) (No. 00-744)), the Act mandates that the FCC "shall issue an order preempting the State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). The FCC's obligation to stand in the shoes of non-participating state regulators extends to every aspect of the regulatory responsibilities under section 252, including the interpretation and enforcement of disputed

terms of an agreement. *Starpower*, ¶¶ 6-9. And like state commission "determinations under [section 252]," FCC determinations are subject to exclusive federal judicial review (47 U.S.C. § 252(e)(6)) in the federal courts of appeals under the Hobbs Act (47 U.S.C. § 402(a); 28 U.S.C. § 2342).

Federal judicial review of determinations relating to section 252 agreements, whether those determinations are made by a state commission or by the FCC, obviously is a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the application of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

C. The Interconnection Agreements At Issue In This Case. Because section 252 agreements implement the requirements of the Act, parties to those agreements often use language that "tracks the controlling law" in order to make clear that the rights and obligations prescribed by the agreements are limited to those prescribed by the Act. As the Fourth Circuit has held, "[w]here a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law," and therefore is intended to "comply with" and implement "the requirements of the Act." *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

As required by the Act, Ameritech entered into interconnection agreements with several competing LECs.

Those agreements clearly state that the parties' rights and duties are what federal law says they are, generally and with respect to reciprocal compensation in particular. Of the agreements at issue in this case, four state that they "set forth * * * the terms and conditions under which the Parties interconnect their networks and provide other services *as required by the Act* as set forth herein." The fifth provides that "[t]he parties acknowledge that [their] respective rights and obligations * * * are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date."

As required by section 251(b)(5) of the Act, the agreements establish reciprocal compensation arrangements between the parties. And, again, those agreements clearly state that the parties' reciprocal compensation obligations are "as required by the Act." The reciprocal compensation provision in each agreement appears under a heading that cites the reciprocal compensation provision in the Act: "Reciprocal Compensation Arrangements - Section 251(b)(5)." And all five agreements specifically provide that the parties' reciprocal compensation arrangements are "As Described in the Act" (SA48; SA57; SA80; SA89; SA100)[1], which is in turn defined in each agreement to mean "as described in or required by the Act" (SA39; SA53; SA71; SA85; SA96).

D. The Proceedings Below. In 1997, various competing LECs filed complaints against Ameritech in the Illinois Commerce Commission ("ICC"), alleging that Ameritech had failed to comply with its obligation to pay reciprocal compensation on Internet traffic under its section 252 interconnection agreements. As noted above, those agreements provided in relevant part that the parties' reciprocal

[1] "SA" refers to Ameritech's Separate Appendix in the court of appeals.

compensation arrangements are "As Described in the Act," which is in turn defined to mean "as described in or required by the Act." The ICC Commissioners, invoking "jurisdiction under the [Illinois] Public Utilities Act and Section 252 of the Telecommunications Act of 1996 * * * to interpret and enforce the terms of interconnection agreements" (*Teleport Communications Group, Inc.* v. *Illinois Bell Tel. Co.*, Nos. 97-0404, 97-0519 & 97-0525 (consolidated), at 10 (ICC Mar. 11, 1998) ("ICC March 11, 1998 Order")), agreed with the competing LECs. The Commissioners held that "by discontinuing its reciprocal compensation payments" on Internet traffic, Ameritech violated "its interconnection agreements, and its duty under the Act." *Id.* at 11.

Ameritech brought an action in federal district court against the Commissioners in their official capacities under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, seeking review of the determinations in the Commissioners' Order. The Commissioners moved to dismiss for lack of jurisdiction and on Eleventh Amendment immunity grounds. The district court rejected the Commissioners' arguments, finding jurisdiction to resolve Ameritech's complaint under section 252(e)(6) (Pet. App. 26a-29a & n.3), and holding that the Commissioners (i) waived the state's Eleventh Amendment immunity by participating voluntarily in the federal regulatory scheme under the Act (*id.* at 30a) and (ii) were subject to suit in the official capacities under the *Ex parte Young* doctrine, *id.* On the merits, the district court upheld the Commissioners' determination, characterizing the issue as "whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act for" Internet-bound traffic, and holding that the ICC did not err in determining that the agreements and section 251(b)(5) do, in fact, require reciprocal compensation on such traffic. *Illinois Bell Tel. Co.* v.

WorldCom Technologies, Inc., 1998 WL 419493, at *9, *12-*15 (N.D. Ill. July 23, 1998).

On appeal to the Seventh Circuit, Ameritech argued that (i) "the Act does not require reciprocal compensation" on Internet traffic, (ii) "the agreements precisely track the Act (reciprocal compensation is 'as described in the Act')," and (iii) "therefore the agreements cannot require reciprocal compensation for calls to ISPs." Pet. App. 19a. In other words, Ameritech did not argue that the Act *prohibited* Ameritech from agreeing to pay reciprocal compensation on Internet calls. Rather, Ameritech argued that (i) the Act did not *require* payment of reciprocal compensation on Internet calls, and (ii) Ameritech did not agree to pay reciprocal compensation on Internet calls, but instead entered into a binding section 252 agreement that limited Ameritech's reciprocal compensation obligations to the requirements of the Act.

Despite the court's earlier statement that "[d]ecisions of state agencies implementing the 1996 Act are reviewable in federal district courts" (*Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)), the Seventh Circuit declined to answer the primary question posed by Ameritech's challenge to the Commissioners' Order. Instead, after rejecting the Commissioners' Eleventh Amendment immunity argument, the court held that it lacked jurisdiction to decide whether the Commissioners erred in holding that the section 252 agreements required the payment of reciprocal compensation on Internet calls. Pet. App. 4a-5a. As the court explained, a claim that the Commissioners "'interpret[ed]' an agreement contrary to its terms creates a different kind of problem -- one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* Thus, the court refused to adjudicate Ameritech's claim that the ICC failed to enforce the provisions of the section 252

agreements that limited Ameritech's reciprocal compensation obligations to those "described in or required by the Act."

REASONS FOR DENYING THE PETITION

I. THE COURTS OF APPEALS UNIFORMLY HAVE HELD THAT STATE COMMISSION ACTIONS ENFORCING SECTION 252 INTERCONNECTION AGREEMENTS ARE DETERMINATIONS "UNDER SECTION 252" AND THUS ARE REVIEWABLE IN FEDERAL COURT UNDER 47 U.S.C. § 252(e)(6).

Petitioners first contend that this Court should review the Seventh Circuit's holding that federal courts have jurisdiction under section 252(e)(6) of the Act to review state commission determinations concerning the interpretation and/or enforcement of previously approved section 252 interconnection agreements. Pet. 12-18. This contention is without merit for several reasons.

A. To begin with, there is no circuit split. The federal courts of appeals uniformly have held that (i) state commissions are authorized under the 1996 Act to interpret and enforce section 252 interconnection agreements, and (ii) decisions interpreting and enforcing those agreements constitute "determinations under section 252." See, *e.g.*, *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000) (holding that under section 252(e)(6) of the Act, "[t]he district court * * * had jurisdiction to review the OCC's decision interpreting and enforcing the federally mandated Interconnection Agreement"); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("the state commission's power to enforce a federally mandated interconnection agreement arises from § 252, and thus a state commission's decision enforcing the agreement is a 'determination' under that section" that is reviewable in federal court under section

252(e)(6)); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-80, 481 (5th Cir. 2000) (noting that "the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved" and holding that "district courts have jurisdiction to review * * * interpretation and enforcement decisions of the state commissions").[2]

The FCC has reached precisely the same conclusion as the courts of appeals. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC No. 00-216, ¶¶ 6, 9 (rel. June 14, 2000) ("*Starpower*") (holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under

[2] See also *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 338, 341 (7th Cir. 2000), petitions for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653) & 69 U.S.L.W. 3346 (U.S. Nov. 6, 2000) (No. 00-744) (holding that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission" and that "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place"); *Puerto Rico Tel. Co.* v. *Telecomms. Regulatory Bd.*, 189 F.3d 1, 9-10 (1st Cir. 1999) (holding that a state commission action constitutes "a 'determination' under § 252" and thus "fall[s] within the jurisdictional bounds of § 252(e)(6)," if the aggrieved party's complaint alleges "a substantial nexus between the commission's determination and an interconnection agreement").

section 252" and assuming jurisdiction over interpretation dispute subject to "judicial review of [its] findings" under section 252(e)(6)).

Under these circumstances, there is no compelling need for this Court to review petitioners' first question. Moreover, the Seventh Circuit's resolution of that question plainly was correct. As the courts consistently have recognized, section 252 is the sole source of petitioners' authority to participate in the formation, approval, and enforcement of federally mandated interconnection agreements. See, *e.g.*, *Connect Communications*, 225 F.3d at 947 (holding that the "state commissions' power to enforce interconnection agreements springs from § 252"); *MCI Telecommunications Corp.*, 222 F.3d at 343 (holding that state commissions' "authority to act was derived from provisions of the Act and not from their own sovereign authority"). Section 252 makes clear that state regulators who choose to participate in the process of determining the interconnection agreement obligations that implement the 1996 Act must play by the federal rules of the game, and section 252(e)(6) gives federal courts jurisdiction to ensure that they do. The FCC likewise has stressed that the states are "permitted to continue to regulate in areas encompassed by the Act" — such as the basic procedural and substantive principles governing section 252 interconnection agreements — "only to the extent consistent with the Act and implementing FCC regulations." Brief for the United States and the Federal Communications Commission in Opposition in *Public Service Comm'n* v. *Wisconsin Bell, Inc.* and *Illinois Commerce Comm'n* v. *MCI Telecommunications Corp.*, Nos. 00-653 & 00-744 (U.S. filed Dec. 26, 2000). In short, the language, structure, and purpose of the statutory scheme make clear that state commission enforcement decisions are rendered "under section 252" and thus are reviewable under section 252(e)(6).

B. Petitioners' contrary contention rests on numerous flawed premises.

1. Ameritech does not quarrel with petitioners' initial observation that federal district court review is limited to "state commission determinations made *under section 252*." Pet. 12 (emphasis in original). But this observation simply begs the central question: whether a state commission's action in purporting to enforce the terms of an approved section 252 interconnection agreement constitutes a "determination under [section 252]" of the 1996 Act. As noted above, every federal court of appeals to have considered this question has answered it in the affirmative. Moreover, petitioners themselves reached the same conclusion when they asserted jurisdiction over this case.

In its complaint before the ICC, respondent Teleport Communications Group ("TCG") alleged that "[t]his Commission has clear and unquestioned authority under both the *federal Telecommunications Act of 1996* * * * and the [Illinois Public Utilities Act] to interpret or enforce the provisions of Interconnection Agreements." TCG Complaint at 5 (filed Sept. 8, 1997) (emphasis added). Respondent WorldCom Technologies, Inc. ("WorldCom") similarly invoked the Commission's jurisdiction "under the PUA and the specific authority granted to state commissions under *Section 252 of the Federal Act* to enforce the terms of the agreements i[t] approves." WorldCom Complaint at 10 (filed Oct. 9, 1997) (emphasis added). Even more damning to the Commissioners' current position, however, is their own statement that "[t]his Commission's jurisdiction *under* the Public Utilities Act and *Section 252 of the Telecommunications Act of 1996* * * * to interpret and enforce the terms of interconnection agreements is not disputed." ICC March 11, 1998 Order at 10 (emphasis added). In short, petitioners' belated insistence that they did not act under section 252 rings hollow in the face of their own

assertion of jurisdiction "under * * * Section 252" in the very Order that gave rise to Ameritech's section 252(e)(6) lawsuit.

2. In any event, petitioners' contention (at 13) that "[t]he only state commission determinations that can be made under section 252 are those determinations made in the arbitration and approval process" — which has been rejected by every court of appeals that has addressed it, as well as by the FCC — is wrong.

a. Petitioners first attempt to find support for their position in 47 U.S.C. § 252(e)(5), which directs the FCC to preempt non-participating state commissions. In particular, petitioners insist that "the FCC's authority to preempt state commission jurisdiction under section 252(e)(5) makes sense only with respect to the mediation and arbitration responsibilities given to state commissions under § 252." Pet. 13. This contention runs headlong into the FCC's own holding — which is entitled to *Chevron* deference — that it may preempt a state commission's jurisdiction over a dispute regarding the proper interpretation of the terms of a section 252 interconnection agreement if a state commission fails to carry out its "responsibility" under section 252 to resolve such a dispute. *Starpower*, ¶¶ 6-9.

Moreover, even if petitioners were correct in their assertion that "the FCC is not authorized to preempt state commissions' jurisdiction to hear complaints brought under *state law*" (Pet. 14; emphasis in original), *Starpower* demonstrates that a complaint seeking a state commission determination with respect to the parties' obligations under a section 252 interconnection agreement is *not* brought under state law. In *Starpower*, the FCC construed the 1996 Act to require it to perform the federal regulatory duties ordinarily undertaken by a state commission in a case — identical to this one — in which the *sole issue* is whether a section 252 interconnection

agreement requires the payment of reciprocal compensation on Internet traffic. *Starpower*, ¶ 9 (holding that the FCC would "proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: *whether the existing interconnection agreements between Starpower and GTE and Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic*") (emphasis added). A necessary corollary of the FCC's construction of the Act is that a dispute over the scope of a party's obligations under a previously approved section 252 agreement arises under *federal* law.

b. Petitioners' related assertion (at 15) that "[t]he Act establishes a bright line between arbitrating and approving an agreement on the one hand and interpreting and enforcing it, on the other" has been soundly rejected by the courts of appeals and the FCC, which consistently have held that all of these regulatory tasks lie within the scope of a state commission's (or, in its place, the FCC's) regulatory functions under the Act. See cases cited at 9-11, *supra*. These decisions are clearly correct. When a state commission construes a previously approved section 252 agreement in a manner that deviates from the plain and "binding" terms of that agreement (47 U.S.C. § 252(a)(1)), it has effectively approved a new agreement (and rejected the old agreement). And Ameritech claims that petitioners did precisely that in this case.

Petitioners' suggestion that identical state commission determinations, one made in an arbitration and the other made in an enforcement proceeding, should be treated differently for purposes of federal review under section 252(e)(6) would frustrate Congress's manifest design to ensure uniform implementation of the 1996 Act through federal judicial review. As the Tenth Circuit recently explained, Congress "could not have intended" to adopt petitioners' arbitrary, time-based limitation on judicial review, because "certain state commission

decisions would escape federal review simply because the dispute arose after the agreement had been approved." *Southwestern Bell Tel. Co.*, v. *Brooks Fiber Communications*, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000). Under a sensible construction of the Act's judicial review provisions, federal court review must be available to ensure that all state commission (or FCC) determinations concerning federal interconnection obligations — whether they are made before, during, or after the approval of the pertinent section 252 agreement — are consistent with the federal Act. See *MCI Telecommunications Corp.*, 222 F.3d at 341 (noting that "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place").

As the Fourth Circuit has recognized, because many of the duties imposed by the Act are mandatory, parties often use language that "tracks the controlling law." *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) (emphasis added). Such provisions are presumed to have been "negotiated *with regard to* the 1996 Act," and accordingly draw their meaning from the Act. *Id.* In other words, when "a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law," and is intended to "comply with" and implement "the requirements of the Act." *Id.*

The section 252 agreements at issue here fit directly within the paradigm outlined by the Fourth Circuit: they provide that reciprocal compensation arrangements are "As Described in the Act." Such agreements, *by definition*, complied with the Act at the time of their approval, and thus there was no need for federal court review under section 252(e)(6) at that time. The need for federal judicial review arose later, when petitioners

effectively altered those agreements and in doing so stripped Ameritech of its rights under those agreements — which, by their express terms, strictly limited Ameritech's obligations to pay reciprocal compensation to the requirements of the Act. The Fourth Circuit has observed that it would "stretch the bounds of imagination" to construe a provision that tracks the Act to mean that the parties intended to impose obligations that deviate from the requirements of the Act. *AT&T Communications*, 229 F.3d at 465. And Ameritech alleges that that is precisely what petitioners did here. To exclude such claims from section 252(e)(6) would undermine Congress's manifest intent to ensure the uniform implementation of the requirements of the 1996 Act through "federal court review of any regulatory determination made under [section 252]" (*MCI Telecommunications*, 222 F.3d at 341), whether by state commissioners or by the FCC.

3. Finally, petitioners assert that "the Seventh Circuit's sweeping interpretation" of the "narrow judicial review provision" in section 252(e)(6) "radically shifts judicial review of many state commission actions involving purely local matters from state courts to federal courts." Pet. 10. This assertion is doubly flawed. To begin with, disputes over the obligations of telecommunications carriers under a federally mandated section 252 interconnection agreement — particularly where, as here, those obligations expressly are limited to the obligations prescribed by the federal Act — manifestly are not "local matters." As this Court has noted, with regard to those "matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the states." *AT&T Corp.*, 525 U.S. at 378 n.6. In addition, far from interpreting section 252(e)(6) in "sweeping" fashion, the court below read the scope of federal jurisdiction under that provision more narrowly than any other court of appeals. As petitioners

themselves note (at 9), the Seventh Circuit held that "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.'" Pet. App. 5a. Contrary to petitioners' contention, the Seventh Circuit's interpretation does not "give[] federal district courts jurisdiction to review every state commission action concerning interconnection agreements." Pet. 1. In fact, it excludes a large class of disputes from federal court review in the Seventh Circuit that would be reviewable in federal court under the law of several other circuits.

As Ameritech has explained in its petition for a writ of certiorari in No. 00-921 — in which it seeks review of the court of appeals' decision below on grounds other than those asserted by petitioners here — the decision below holds that federal courts lack jurisdiction to decide the merits of a claim that a state commission failed to enforce provisions of a section 252 agreement that limit a carrier's obligations to the requirements of the Act, because "a state forum can supply a remedy" for that claim. Pet. App. 5a. The court's holding in *that* regard conflicts with decisions of the Eighth Circuit in *Southwestern Bell Tel.* Co. v. *Connect Communications Corp.*, 225 F.3d 942, 946-48 (8th Cir. 2000), the Fifth Circuit in *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n*, 208 F.3d 475, 481-82 (5th Cir. 2000), and, most recently, the Tenth Circuit in *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000), all of which held that a claim that a state commission has disregarded express limitations on the scope of a carrier's obligations under a section 252 interconnection agreement is reviewable in federal court. The Seventh Circuit's "absurd jurisdictional scheme" (*Brooks Fiber*, 2000 WL 1827576, at *4 n.2) also conflicts with the FCC's Order in *Starpower*, CC Docket No.

00-52, FCC No. 00-216, ¶¶ 6-9, which treats a claim identical to the claim that was before the Seventh, Eighth, Fifth, and Tenth Circuits in the aforementioned cases as being federal in nature and thus reviewable in the federal courts.

In sum, then, the court of appeals below erred in construing section 252(e)(6), but the court's error was not in the breadth, but rather in the narrowness, of its view of the scope of federal jurisdiction under the Act. This Court should intervene to resolve the conflict and clear up the confusion concerning the question presented in No. 00-921, but should decline to review the jurisdictional question presented in this petition, on which there is neither conflict nor confusion.

II. THE SEVENTH CIRCUIT'S HOLDING THAT PETITIONERS WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY BY PARTICIPATING IN THE ACT'S FEDERAL REGULATORY SCHEME DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

A. As an initial matter, this case is not a proper vehicle for consideration of either of the questions presented that relate to the Eleventh Amendment. The court of appeals below did not even mention *Ex parte Young*, much less consider whether that doctrine provided a basis for suing the Commissioners in this case. Nor did the panel undertake an independent analysis of the waiver issue (see Pet. App. 12a-13a); it simply followed the binding circuit precedent established in *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 168 F.3d 315 (7th Cir. 1999), in which the court held that the state commission's voluntary participation in the federal regulatory scheme under the Act constituted a waiver of Eleventh Amendment immunity and expressly declined to reach the *Ex parte Young* question. The Seventh Circuit subsequently vacated that opinion and granted rehearing in light of this Court's decisions in *Alden* v. *Maine*, 527 U.S. 706 (1999), *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627 (1999). See *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 183 F.3d 567 (7th Cir. 1999). On rehearing, the panel reaffirmed its earlier holding that "in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000). In addition, as "an independent basis for decision," the court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Id.*

The Seventh Circuit's decision on rehearing in *MCI Telecommunications* thus considered the Eleventh Amendment questions presented in this petition, and if those questions had any merit at all, *MCI Telecommunications* — in which both the Wisconsin and Illinois Commissioners have filed petitions for certiorari, Nos. 00-653 and 00-744 — would be a more appropriate vehicle for further review by this Court. In any event, even if the decision below had addressed the waiver and *Ex parte Young* issues, petitioners have not demonstrated any "compelling reasons" (Sup. Ct. R. 10) for granting review on those issues. Simply put, petitioners have failed to identify either a circuit split or a conflict with a decision of this Court that might be worthy of this Court's attention.

B. Petitioners raise the specter of a conflict between the Seventh Circuit's holding that the Illinois Commission's participation in the federal regulatory scheme set forth in the Act constitutes a waiver of Eleventh Amendment immunity and this Court's decision in *College Savings Bank*. This purported

conflict results from a misreading of both *College Savings* and the Act.

In *College Savings*, this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit. 527 U.S. at 675-76. *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress has clearly conditioned on waiver of Eleventh Amendment immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. *Id.* at 676, 678 n.2, 686-87; see also *Alden*, 527 U.S. at 755 (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"). At the same time, the Court made clear that a state does not waive its Eleventh Amendment immunity by simply engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *College Savings*, 527 U.S. at 687.

This Court illustrated through reference to its prior decisions the critical distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in "otherwise permissible activity" (which is unconstitutional). The Court first discussed (and overruled) its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. That decision, the Court concluded, was no longer tenable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could not use its Article I powers to abrogate unilaterally a state's Eleventh Amendment immunity. Because "a congressional power to exact constructive waivers of sovereign immunity * * * would

* * *, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," the Court overruled *Parden*. *College Savings*, 527 U.S. at 683. And because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its Eleventh Amendment immunity. *Id.* at 687, 691. In sum, *College Savings* held that Congress cannot make consent to suit a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such activity is a "sanction" that "coerces" a state into consenting to suit.

At the same time, however, this Court in *College Savings* reaffirmed its holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which together establish that Congress is free to condition a grant of money or authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact at issue in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

C. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls plainly on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

In the 1996 Act, Congress has enacted a comprehensive federal legislative scheme governing certain areas of local telecommunication competition. As this Court has noted, the states "unquestionably" have been preempted in those areas (*AT&T Corp.*, 525 U.S. at 378 n.6), and as a consequence they have no right to participate in the regulation of those areas under the new federal scheme. Congress, in its sole discretion, could have decided that the federal statutory scheme would be implemented exclusively by federal regulators.

Accordingly, administration of the Act's local competition provisions — including those relating to the arbitration, approval or rejection, and enforcement of interconnection agreements — is not an "otherwise permissible activity" in which a state may engage without Congress's permission. Rather, it is a wholly new activity, the terms and conditions of which were established by Congress. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's federal regulatory program. As with the formation of an interstate compact, participation in the administration of a federal regulatory program as a "'deputized' federal regulator[]" (*MCI Telecommunications*, 222 F.3d at 344) is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a role in the administration of the "new federal regime." *AT&T Corp.*, 525 U.S. at 378 n.6. Among other things, states are invited, through their public utility commissions, to participate in the arbitration, approval, and enforcement of interconnection agreements between incumbent and competing LECs. Congress also made clear that if a state chooses to accept the invitation to have its officials serve as deputized federal regulators, it must consent to review of its actions in federal

court. 47 U.S.C. §§ 252(e)(4) & (6). The imposition of this condition makes eminent sense, for as this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6. And, finally, the Act does not compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state does decline Congress's invitation, the Act merely provides that the FCC will step into the shoes of the non-participating state regulators, applying the same federal standards, again subject to federal judicial review. *Id.*

As the foregoing demonstrates, the 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The opportunity to participate *as a regulator* in the implementation of a federal statute — an activity that did not preexist the 1996 Act and that Congress could have reserved exclusively to the federal government — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity ordinarily does not implicate unique federal interests. By contrast, when a state voluntarily acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. That is precisely what Congress intended to accomplish through its conditional invitation to the states under the Act, and any state that accepts Congress's invitation cannot

escape the consequences of its voluntary action. In short, the Seventh Circuit decision follows inexorably from this Court's reaffirmation of *Petty* and *Dole*.

Moreover, the only other court of appeals to have decided whether the waiver of Eleventh Amendment immunity solicited under the Act is valid under *College Savings* has reached precisely the same conclusion, on the same grounds, as the Seventh Circuit. *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000) ("by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity"), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593).

D. Petitioners also attempt to manufacture a circuit split on the basis of *GTE North* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), but the Sixth Circuit's brief discussion of waiver, in a footnote (see *id.* at 922 n.6), was plainly dicta. The parties neither briefed nor argued a waiver theory in *GTE North*, because the district court's jurisdiction over the preemption claim in that case was not based on the 1996 Act, but rather on 28 U.S.C. § 1331. *GTE North*, 209 F.3d at 912.

III. UNDER THE DECISIONS OF THIS COURT AND THE UNIFORM HOLDINGS OF THE COURTS OF APPEALS, PETITIONERS MAY BE SUED UNDER *EX PARTE YOUNG*.

A. Three federal courts of appeals have addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine. In *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.),

cert. denied, 121 S. Ct. 54 (2000), the Sixth Circuit answered that question in the affirmative, holding that such a suit "is a straightforward *Ex parte Young* case." As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * * for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* Subsequently, the Tenth Circuit reached precisely the same conclusion, expressly "adopt[ing] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 939 (10th Cir. 2000) (quoting *Michigan Bell*, 202 F.3d at 867), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). And most recently, the Seventh Circuit reached the same conclusion, expressly "agree[ing] with the Sixth and Tenth Circuits that these suits are 'straightforward' *Ex parte Young* cases." *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 345 (7th Cir. 2000), petitions for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653) & 69 U.S.L.W. 3346 (U.S. Nov. 6, 2000) (No. 00-744). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

B. The Commissioners' contention that a lawsuit against them under the 1996 Act conflicts with this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), is simply wrong.

1. First, petitioners cannot point to any authority for their novel theory (see Pet. 21-24) that Congress must specifically authorize an *Ex parte Young* remedy. Indeed, were that the case, *Ex parte Young* would have been decided differently, because there is no indication that Congress specifically authorized the *Ex parte Young* remedy approved in that case.

2. Petitioners' contention that a party must allege a "constitutional violation" in order to invoke *Ex parte Young* (Pet. 24-28) is contradicted by numerous decisions of this Court and the federal courts of appeals. Under long established precedent, a party seeking to restrain state action may, consistent with the Eleventh Amendment, maintain a suit "when the action sought to be restrained is without the authority of state law or contravenes the *statutes* or Constitution of the United States." *Cory* v. *White*, 457 U.S. 85, 89 (1982) (emphasis added) (quoting *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 297 (1937)). See also *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) (*Ex parte Young* actions exist "to ensure the supremacy of federal *statutory* and constitutional law") (emphasis added); *MSA Realty Corp.* v. *Illinois*, 990 F.2d 288, 291 (7th Cir. 1993) ("the federal courts may exercise jurisdiction over suits alleging violations of federal constitutional *or statutory law* that are brought against state officials") (emphasis added); 17 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4232 (1988) (Under *Ex parte Young*, a "federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly *or because it is contrary to a federal statute or regulation* that is the supreme law of the land") (emphasis added).

3. Finally, petitioners contend that the Seventh Circuit erred in allowing respondents to proceed under *Ex parte Young* because respondents "requested a declaration that the ICC

violated the law in the past" (Pet. 29), and thus did not allege the "ongoing violation" that *Ex parte Young* requires. Petitioners' suggestion that their order has no "ongoing" effects and, at most, constitutes a past violation of federal law is simply wrong. In arbitrating and enforcing interconnection agreements under section 252, petitioners exercise *coercive regulatory power*, and what results from the exercise of that power are carrier-specific government regulations that are legally binding on the parties unless and until they are set aside by a federal court pursuant to section 252(e)(6).

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in the enforcement proceedings in this case would be available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection order that Ameritech is challenging here has "ongoing" legal consequences. Indeed, it is well established that an official capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought operates prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2000

(4) (4)

Nos. 00-878 and 00-921

IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

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Pursuant to Supreme Court Rule 15.8, respondents file this supplemental brief to bring to the Court's attention the rulings issued by the United States Court of Appeals for the Fourth Circuit on February 14, 2001, in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.* (Nos. 99-2459, -2616) and *BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission* (Nos. 99-1845, -1846, -1847, -1970). These decisions address questions closely related to the Eleventh Amendment and subject matter jurisdiction issues raised by the Illinois Commerce Commission in this case. They do so in ways that arguably conflict with the ruling of the Seventh Circuit on those questions. Copies of the opinions have been lodged with the Clerk.

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IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*

Petitioners,

v.

WORLDCOM TECHNOLOGIES, *et al.*,

Respondents.

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APPENDIX A - LIST OF RELEVANT DOCKET ENTRIES

Date	Event
	Illinois Commerce Commission
September 8, 1997	Complaint of Teleport Communications Group, Inc. filed with Illinois Commerce Commission (JA 52a).
October 9, 1997	WorldCom Technologies, Inc. complaint filed with Illinois Commerce Commission (JA 77a).
October 10, 1997	MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc., complaint filed with Illinois Commerce Commission (JA 90a).
October 17, 1997	Petition to Intervene filed by Focal Communications Corp.
November 3, 1997	Petition to Intervene filed by AT&T Communications of Illinois, Inc.

November 4, 1997	Three complaints consolidated by Illinois Commerce Commission Hearing Examiner.
November 21, 1997	Evidentiary hearing held.
March 11, 1998	Order of Illinois Commerce Commission issued (JA 96a).

United States District Court, Northern District of Illinois, and Illinois Appellate Court, Third District

March 27, 1998	Complaint No. 98 C 1925 filed by Ameritech Illinois, Inc. in United States District Court for the Northern District of Illinois, Eastern Division (JA 125a).
May 1, 1998	District court issues stay of order of Illinois Commerce Commission.
May 14, 1998	Petition for Review of the Order of the Illinois Commerce Commission filed by Illinois Bell Telephone Company (Ameritech Illinois), Illinois Appellate Court, Third District.
May 18, 1998	Commissioners of the Illinois Commerce Commission file

	first Motion to Dismiss Complaint (subject matter jurisdiction/11th Amendment).
May 20, 1998	Commissioners of the Illinois Commerce Commission file second Motion to Dismiss Complaint (collateral estoppel/*res judicata*/abstention).
May 20, 1998	District court orders that it will rule on jurisdictional issues separately from the merits of the complaint, without prejudice to defendant Commissioners' position regarding jurisdiction.
June 19, 1998	Illinois Appellate Court, Third District, grants motion of Ameritech Illinois for stay of all proceedings pending resolution of all issues in dispute in United States District Court case.
July 21, 1998	District court opinion and order ruling on the merits (JA 147a).
August 4, 1998	District court entry of final judgment as to all defendants

except "the Illinois Commerce Commission." (JA 181a)

August 25, 1998 — District court opinion and order denying Commissioners' motions to dismiss (Pet. App. 23a-35a).

United States Court of Appeals for the Seventh Circuit

May 10, 1999 — Oral Argument on consolidated appeals, United States Court of Appeals for the Seventh Circuit.

June 18, 1999 — Opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 6a-22a)

August 19, 1999 — Order of the United States Court of Appeals for the Seventh Circuit holding petitions for rehearing in abeyance pending decision on rehearing in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, No. 98-2127, and amending opinion of June 18, 1999 (Pet. App. 3a-5a).

August 9, 2000 — Order of the United States Court of Appeals for the Seventh Circuit denying petitions for rehearing (Pet. App. 1a-2a)

APPENDIX B - EXCERPTS FROM INTERCONNECTION AGREEMENTS (ILLINOIS)

1. Ameritech-MFS Intelenet of Illinois, Inc.

AMENDED AND RESTATED INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of April 8th 1997

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech services, Inc. on behalf of Ameritech Illinois and MFS INTELENET OF ILLINOIS, INC.

* * * * * * * * *

AMENDED AND RESTATED INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This amended and Restated Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("Agreement"), is effective as of the ___ day of April 1997, by and between Ameritech Information Industry Services, a division of Ameritech Services, Inc., a Delaware Corporation with offices at 350 N. Orleans, Third Floor, Chicago, Illinois 60654, on behalf of Ameritech Illinois ("Ameritech") and MFS Intelenet of Illinois, Inc., ("MFS") a

Delaware corporation with offices at 1 Tower Lane, 27th Floor, Oakbrook Terrace, Illinois 60181.

WHEREAS. the Parties want to interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services (as defined below) and Exchange Access (as defined below) to their respective Customers.

WHEREAS. the Parties entered into an Interconnection Agreement dated as of May 17, 1996 (the "Effective Date") (the "Existing Interconnection Agreement") that set forth the respective obligations of the Parties and the terms and conditions under which the Parties interconnected their networks and provided other services as required by the Act (as defined below) and additional services as set forth in such Existing Interconnection Agreement.

WHEREAS. MFS has exercised its rights under Section 28.14 of the Existing Interconnection Agreement and Section 252(i) of the Act to incorporate the terms and conditions of an Other Agreement (as defined in the Existing Interconnection Agreement) as provided in Section 28.14 of the Existing Interconnection Agreement, and the Parties are entering into this Amended and Restated Interconnection Agreement to reflect such terms and conditions of such Other Agreement and certain other amendments mutually agreed upon by the Parties.

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, MFS and Ameritech hereby agree as follows:

* * * * * * * *

1.0 Definitions

* * * * * * * *

1.5 "As Defined in the Act" means as specifically defined by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

1.6 "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

* * * * * * * *

1.38 "Local Traffic" means a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided, that in no event shall a Local Traffic call be more than fifteen (15) miles as so calculated.

* * * * * * * *

1.51 "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications originating on one Party's network and terminating on the other Party's network.

* * * * * * * *

2.0 INTERPRETATION AND CONSTRUCTION.

All references to Sections, Exhibits and Schedules shall be deemed to be references to Sections of, and Exhibits and Schedules to, this Agreement unless the context shall otherwise require. The headings of the Sections and the terms defined in Schedule 1.0 are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. Unless the context shall otherwise require, any reference to any agreement, other instrument (including Ameritech or other third party offerings, guides or practices), statute, regulation, rule or tariff is to such agreement, instrument, statute, regulation, rule or tariff as amended and supplemented from time to time (and, in the case of a statute, regulation, rule or tariff, to any successor provision).

* * * * * * * *

5.8 Reciprocal Compensation Arrangements - Section 251(b)(5)

5.8.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or MFS which a Telephone Exchange Service Customer originates on Ameritech's or MFS' network for termination on the other Party's network.

5.8.2 The Parties shall compensate each other for transport and termination of Local Traffic at the rates provided int eh Pricing Schedule.

5.8.3 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All

Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

5.8.4 Each Party shall charge the other Party its effective tariffed intraLATA FGD Switched access rates for the transport and termination of all IntraLATA Toll Traffic.

5.8.5 Compensation for transport and termination of all traffic which has been subject to performance of INP by one Party for the other Party pursuant to Section 13.0 shall be as specified in Section 13.5.

* * * * * * * * *

6.3 Meet-Point Billing Arrangements

Meet-Point Billing arrangements between the Parties for jointly-provided Switched Exchange access Services on Access Toll Connecting Trunks will be governed by the terms and conditions of the Agreement for Switched Access Meet Point Billing and shall be billed at each Party's applicable switched access rates.

* * * * * * * * *

28.7 Governing Law

For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the FCC, the exclusive jurisdiction and remedy for all such claims shall as provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues

within the jurisdiction (primary or otherwise) of the Commission, the exclusive jurisdiction for all such claims shall be with such Commission, and the exclusive remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of Illinois without reference to conflict of law provisions.

* * * * * * * * *

28.11.3 If the Parties are unable to resolve issues related to the Disputed Amounts within forty-five (45) days after the Parties' appointment of designated representatives pursuant to Section 28.11.2, then either Party may file a complaint with the Commission to resolve such issues or proceed with any other remedy pursuant to law or equity. The Commission may direct release of any or all funds (including any accrued interest) in the escrow account, plus applicable late fees, to be paid to either Party.

2. Ameritech-Focal Communications Corp.

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of October 28th 1996

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services, Inc. on behalf of Ameritech Illinois

and

FOCAL COMMUNICATIONS CORPORATION

* * * * * * * * *

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("Agreement"), is effective as of the 28th day of October, 1996 (the "Effective Date"), by and between Ameritech Information Industry Services, a division of Ameritech Services, Inc., a Delaware Corporation with offices at 350 N. Orleans, Third Floor, Chicago, Illinois 60654, on behalf of Ameritech Illinois ("Ameritech") and Focal Communications Corporation, a Delaware Corporation with offices at 300 West Washington Street, Suite 1408, Chicago, Illinois 60606 ("Focal").

WHEREAS, the Parties want to Interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services (as defined below) and Exchange Access (as defined below) to their respective business and residential Customers.

WHEREAS, the Parties are entering into this Agreement to set forth the respective obligations of the Parties and the terms and conditions under which the Parties will interconnect their networks and provide other services as required by the Act (as defined below) and additional services as set forth herein.

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Focal and Ameritech hereby agree as follows:

* * * * * * * * *

1.5 "As Defined in the Act" means as specifically defined by the Act and as from time to time interpreted in the duly authorized rules, regulations and orders of the FCC or the Commission.

1.6 "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

* * * * * * * * *

1.46 "Local Traffic" means a call of which the distance is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the Terminating NXX, or as otherwise determined by the FCC or the commission for purposes of Reciprocal Compensation.

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1.60 "Reciprocal Compensation" is As Described in the Act.

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2.0 INTERPRETATION AND CONSTRUCTION

All references to Sections, Exhibits and Schedules shall be deemed to be references to Sections of, and Exhibits and Schedules to, this Agreement unless the context shall otherwise require. The headings of the Sections are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. Unless the context shall otherwise require, any reference to any agreement, other instrument (including Ameritech or other third party offerings, guides or practices), statute, regulation, rule or tariff is to such agreement, instrument, statute, regulation, rule or tariff as amended and supplemented from time to time (and, in the case of a statute, regulation, rule or tariff, to any successor provision).

* * * * * * * * *

5.8 Reciprocal Compensation Arrangements - Section 251(b)(5).

5.8.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech for Focal which a Telephone Exchange Service Customer originates on Ameritech's or Focal's network for termination on the other Party's network. The Parties shall compensate each other for such transport and termination of Local Traffic at the rate provided in the Pricing Schedule.

5.8.2 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

5.8.3 Each Party shall charge the other Party its effective applicable Federal and State tariffed intraLATA FGD switched access rates for the transport and termination of all IntraLATA Toll Traffic.

5.8.4 Compensation for transport and termination of all traffic which has been subject to performance of INP by one Party for the other Party pursuant to Section 13.0 shall be as specified in Section 13.5.

* * * * * * * * *

6.3 Meet-Point Billing Arrangements

Meet-Point Billing arrangements between the Parties for jointly-provided Switched Exchange Access Services on Access Toll Connecting Trunks will be governed by the terms and conditions of the Agreement for Switched Access Meet Point Billing and shall be billed at each Party's applicable switched access rates.

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29.7 Governing Law

For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the FCC, the exclusive jurisdiction and remedy for all such claims shall be provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the Commission, the exclusive jurisdiction for all such claims shall be with such Commission, and the exclusive remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of Illinois without reference to conflict of law provisions.

* * * * * * * * *

29.11.3 If the Parties are unable to resolve issues related to the Disputed Amounts within forty-five (45) days after the Parties' appointment of designated representatives pursuant to Section 29.11.2, then either Party may file a complaint with the Commission to resolve such issues or proceed with any other remedy pursuant to law or equity. The Commission may direct or the FCC may direct release of any or all

funds (including any accrued interest) in the escrow account, plus applicable late fees, to be paid to either Party.

3. Ameritech-Teleport Communications Group (TCG)

INTERCONNECTION AGREEMENT UNDER SECTION 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of January 7, 1997

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services, Inc. on behalf of Ameritech Illinois

and

TCG ILLINOIS and TCG CHICAGO

* * * * * * * * *

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("Agreement"), is effective as of the 20th day of January, 1997 (the "Effective Date"), by and between Ameritech Information Industry Services, a division of Ameritech Services, Inc., a Delaware Corporation with offices at 350 N. Orleans, Third Floor, Chicago, Illinois 60654, on behalf of and as agent for Ameritech Illinois ("Ameritech") and TCG Illinois and TCG Chicago, New York general partnerships with offices at 1 Teleport Drive, Staten Island, New York 10311 (collectively "TCG").

WHEREAS, the Parties want to interconnect their networks pursuant to this Agreement to provide Telephone Exchange Services (as defined below) and Exchange Access (as defined below) to their respective business and residential Customers.

WHEREAS, the Parties are entering into this Agreement to set forth the respective obligations of the parties and the terms and conditions under which the Parties will interconnect their networks and provide other services as required by the Act (as defined below) and additional services as set forth herein.

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, TCG and Ameritech hereby agree as follows:

* * * * * * * * *

1.4 "As Defined in the Act" means as specifically defined by the Act and as from time to time interpreted in the duly authorized rules, regulations and orders of the FCC or the Commission.

1.5 "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules, regulations and orders of the FCC or the Commission.

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1.43 "Local Traffic" means local service area calls as defined by the Commission.

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1.59 "Reciprocal Compensation" is As Described in the Act.

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2.0 INTERPRETATION AND CONSTRUCTION

All references to Sections, Exhibits and Schedules shall be deemed to be references to Sections of, and Exhibits and Schedules to, this Agreement unless the context shall otherwise require. The headings of the Sections are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. Unless the context shall otherwise require, any reference to any agreement, other instrument (including Ameritech or other third party offerings, guides or practices), statute, regulation, rule or tariff is to such agreement, instrument, statute, regulation, rule or tariff as amended and supplemented from time to time (and, in the case of a statute, regulation, rule or tariff, to any successor provision). In the event of a conflict or discrepancy between the provisions of this Agreement and the Act, the provisions of the Act shall govern.

* * * * * * * *

5.6 Reciprocal Compensation Arrangements Section 251(b)(5)

5.6.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech of TCG with a Telephone Exchange Service Customer originates on Ameritech's or TCG's network for termination on the other Party's network. The Parties shall compensate each other for such transport

and termination of Local Traffic at the rate provided in the Pricing Schedule.

56.2 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

5.6.3 Each Party shall charge the other Party its effective and tariffed applicable federal and state intraLATA FGD switched access rates for the transport and termination of all intraLATA Toll Traffic.

5.6.4 Compensation for transport and termination of all traffic which has been subject to performance of INP by one party for the other Party pursuant to Section 13.0 shall be as specified in Section 13.7.

* * * * * * * *

6.3 Meet-Point Billing Arrangements

Meet-Point Billing arrangements between the Parties for jointly-provided Switched Exchange Access Services on Access Toll Connecting Trunks will be governed by the terms and conditions of the Agreement For Switched Access Meet Point Billing and shall be billed at each Party's applicable switched access rates.

* * * * * * * *

29.6 Governing Law

This Agreement shall be governed by the applicable federal law and by the domestic laws of the State of Illinois without reference to conflict of law provisions.

* * * * * * * * *

29.10.3 If the Parties are unable to resolve issues related to the Disputed Amounts within forty-five (45) days after the Parties' appointment of designated representatives pursuant to Section 29.10.2, then either Party may file a complaint with the Commission to resolve such issues or proceed with any other remedy pursuant to law or equity. The Commission or the FCC may direct release of any or all funds (including any accrued interest) in the escrow account, plus applicable late fees, to be paid to either Party.

4. Ameritech-AT&T Communications of Illinois, Inc.

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THETELECOMMUNICATIONS ACT OF 1996

Dated as of January 14, 1997

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services, Inc. on behalf of and as agent for Ameritech Illinois

and

AT&T COMMUNICATIONS OF ILLINOIS, INC.

* * * * * * * * *

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("Agreement"), is effective as of the 14th day of January, 1997 (the "Effective Date"), by and between Ameritech Information Industry Services, a division of Ameritech Services, Inc., a Delaware Corporation with offices at 350 N. Orleans, Third Floor, Chicago, Illinois 60654, on behalf of and as agent for Ameritech Illinois (Ameritech Illinois referred to herein as "Ameritech") and AT&T Communications of Illinois, Inc., an Illinois Corporation with offices at 227 West Monroe Street, 13th Floor, Chicago, Illinois 60606 ("AT&T")

RECITALS

A. Ameritech is an Incumbent Local Exchange Carrier as defined by the Act, authorized to provide certain Telecommunications Services within Illinois.

B. Ameritech is engaged in the business of providing, among other things, local Telephone Exchange Service within Illinois.

C. AT&T has been granted authority to provide certain local Telephone Exchange Services within Illinois and is a Local Exchange Carrier as defined by the Act.

D. The Parties desire to interconnect their telecommunications networks and facilities to comply with the Act, and exchange traffic so that their respective residential and business Customers may communicate with each other over, between and through such networks and facilities.

E. The Parties are entering into this Agreement to set forth the respective obligations of the Parties and the terms and conditions under which the Parties will Interconnect their networks and facilities and provide to each other Telecommunications Services as required by the Act as set forth herein.

NOW, THEREFORE, in consideration of the mutual premises and the covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, AT&T and Ameritech hereby agree as follows:

* * * * * * * * *

1.3 Interpretation

* * * * * * * * *

(c) The headings of the Articles, Sections, Exhibits and Schedules are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement.

* * * * * * * * *

4.7 Reciprocal Compensation Arrangements Section 251(b)(5)

4.7.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or AT&T which a Telephone Exchange Service Customer originates on Ameritech's or AT&T's network for termination on the other Party's network. The Parties shall compensate each other for such transport and termination of Local Traffic at the rate provided at Item II of the Pricing Schedule.

4.7.2 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

4.7.3 Each Party shall charge the other Party its effective applicable federal and state tariffed intraLATA FGD switched access rates for the transport and termination of all IntraLaTA Toll Traffic.

4.7.4 Compensation for transport and termination of all traffic which has been subject to performance of INP by one

Party for the other Party pursuant to Article XIII shall be as specified in Section 13.7.

* * * * * * * *

6.1 Meet-Point Billing Services

6.1.1 Pursuant to the procedures described in Multiple Exchange Carrier Access Billing ("MECAB") document SR-BDS-000983, issue 5, June 1994, the Parties shall provide to each other the Switched Access Detail Usage Data and the Switched Access Summary Usage Data to bill for jointly provided switched access service such as switched access Feature Groups B and D. The Parties agree to provide this data to each other at no charge. If the procedures in the MECAB document are amended or modified, the Parties shall implement such amended or modified procedures within a reasonable period of time.

6.1.2 AT&T shall designate access Tandems or any other reasonable facilities or points of Interconnection for the purpose of originating or terminating IXC Traffic. For each such access Tandem designated, the Parties shall mutually agree upon a billing percentage as set forth in Schedule 6.1 and shall further agree, within thirty (30) days of the Effective Date, upon billing percentages for additional routes, which billing percentages shall be set forth in Schedule 6.1 as amendments hereto. Either party may make this billing percentage information available to IXCs. The billing percentages shall be calculated according to one of the methodologies specified for such purposes in the MECAB document.

6.1.3 The Parties shall undertake all reasonable measures to ensure that the billing percentage and associated information are maintained in their respective federal and state access tariffs, as required, until such time as such information can be included in the National Exchange association ("NECA") FCC Tariff No. 4. AT&T shall use its best efforts to include in such tariff the billing percentage and associated information as a non-member of NECA.

6.1.4 Each Party shall implement the "Multiple Bill/Single Tariff" option in order to bill the IXC for each Party's own portion of jointly provided Telecommunications Service.

* * * * * * * *

26.6 Remedies

Except as expressly provided herein, no remedy set forth in this Agreement is intended to be exclusive and each and every remedy shall be cumulative and in addition to any other rights or remedies now or hereafter existing under applicable law or otherwise.

* * * * * * * *

28.2.4 If the Parties are unable to resolve issues related to the Disputed Amounts within forty-five (45) days after the Parties' appointment of designated representatives pursuant to Section 28.3, then either Party may file a complaint with the Commission to resolve such issues or proceed with any other remedy pursuant to law or equity. The Commission or the FCC may direct payment of any or Disputed Amounts (including any accrued interest) thereon or additional amounts awarded plus applicable late fees, to be paid to either Party.

* * * * * * * *

28.3 Dispute Escalation and Resolution

Except as otherwise provided herein, any dispute, controversy or claim (individually and collectively, a "Dispute") arising under this Agreement shall be resolved in accordance with the procedures set forth in this Section 28.3. In the event of a Dispute between the parties relating to this Agreement and upon the written request of either Party, each of the Parties shall appoint a designated representative who has authority to settle the Dispute and who is at a high level or management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonable deem necessary in order to discuss the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives, however, all reasonable requests for relevant information made by one Party to the other Party shall be honored. If the Parties are unable to resolve issue related to a Dispute within thirty (30) days after the Parties' appointment of designated representatives as set forth above, the parties shall attempt in good faith to address any default or resolve any Dispute according to the rules, guidelines or regulations of the Commission. Notwithstanding the foregoing, in no event shall the parties permit the pending of a Dispute to disrupt service to any AT&T Customer or Ameritech Customer.

28.4 Equitable Relief

Notwithstanding the foregoing, this **Article XXVIII** shall not be construed to prevent either Party from seeking and obtaining temporary equitable remedies, including temporary restraining orders, if, in its judgment, such action is necessary to avoid irreparable harm. Despite any such action, the Parties will continue to participate in good faith in the dispute resolution procedures described in this **Article XXVIII**.

* * * * * * * *

30.6 Governing Law

For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the FCC, the exclusive jurisdiction and remedy for all such claims shall be as provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the Commission, the exclusive jurisdiction for all such claims shall be with such Commission, and the exclusive remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of Illinois without reference to conflict of law provisions; provided, however, that the Parties shall consult with each other and attempt to agree on a common state law to govern an issue that affects each of the Regional Interconnection Agreements and such issue is not particular to a specific State's law.

* * * * * * * *

SCHEDULE 1.2

DEFINITIONS

* * * * * * * *

"As Defined in the Act" means as specifically defined by the Act and s form time to time interpreted in the duly

authorized rules and regulations of the FCC or the Commission.

"As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

* * * * * * * *

"Local Traffic" means a call the distance of which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided, that in no event shall a Local Traffic call be greater than fifteen (15) miles as so calculated.

* * * * * * * *

"Reciprocal Compensation" is As Described in the Act.

5. Ameritech-MCImetro Access Transmission Services, Inc.

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of May ___, 1997

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services, Inc. on behalf of and as an agent for Ameritech Illinois

and

MCIMETRO ACCESS TRANSMISSION SERVICES, INC.

* * * * * * * *

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This Interconnection Agreement, under Sections 251 and 252 of the Telecommunications Act of 1996 ("**Agreement**"), is effective as of the ____ day of May 1997 (the "**Effective Date**"), by and between Ameritech Information Industry Services, a division of Ameritech Services, Inc., a Delaware corporation with offices at 350 North Orleans, Third Floor, Chicago, Illinois 60654, on behalf of and as agent for Ameritech Illinois ("**Ameritech**"), and MCImetro Access Transmission Service, Inc., a Delaware corporation, with offices at 8521 Leesburg Pike, Vienna, Virginia 22182 ("**MCIm**").

RECITALS

A. Ameritech is an Incumbent Local Exchange Carrier, as defined by the Act, authorized to provide certain Telecommunications Services within Illinois.

B. Ameritech is engaged in the business of providing, among other things, local Telephone Exchange Service within Illinois.

C. MCIm has been granted authority to provide certain local Telephone Exchange Services within Illinois and is Local Exchange Carrier as defined by the Act.

D. The Parties desire to provide for compliance with their respective obligations under Section 251(a), (b), (c) and (e) of the Act, including Interconnection of their facilities and equipment, so that their respective residential and business Customers may communicate with each other over, between and through such networks and facilities.

NOW, THEREFORE, in consideration of the promises and the covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, MCIm and Ameritech hereby agree as follows:

* * * * * * * *

1.3 Interpretation

* * * * * * * *

(c) The headings of the Articles, Sections, Exhibits and Schedules are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement.

* * * * * * * *

4.7 Reciprocal Compensation Arrangements - Section 251(b)(5)

Compensation for the transport and termination of Local Traffic and IntraLATA Toll Traffic shall be pursuant to this **Section 4.7**. Compensation for the transport and termination of any Exchange Access Traffic shall be pursuant to **Article VI**.

4.7.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or MCIm that a Telephone Exchange Service Customer originates on Ameritech's or MCIm's network for termination on the other Party's network. The Parties shall compensate each other for such transport and termination of Local Traffic at the rates provided at Item II of the Pricing Schedule; provided that when Ameritech terminates Local Traffic to MCIm, Ameritech shall only be required to pay MCIm the rate for End Office Local Termination.

4.7.2 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

4.7.3 Each Party shall charge the Other Party its effective applicable federal- and state-tariffed IntraLATA FGD-switched access rates for the transport and termination of all IntraLATA Toll Traffic.

4.7.4 Compensation for transport and termination of all traffic that has been subject to performance of INP by one Party for the other Party pursuant to **Article XIII** shall be specified in **Section 13.8**.

* * * * * * * * *

6.1 Meet-Point Billing Services

6.1.1 Pursuant to the procedures described in Multiple Exchange Carrier Access Billing ("**MECAB**") documents SR-BDS-000983, issue 5, June 1994, the Parties shall provide to each other the Switched Access Detail Usage Data and the Switched Access Summary Usage Data bill for jointly provided switched access service, such as switched access service, such as switched access Feature Groups B and D. The Parties agree to provide this data to each other at no charge. If the procedures in the MECAB documents are amended or modified, the Parties shall implement such amended or modified procedures within a reasonable period of time. The billing procedures set forth in this **Article VI** shall remain in effect until such time as both Parties mutually agree in writing to a billing arrangement to supersede Meet-Point Billing.

6.1.2 MCIm shall designate access Tandems or any other reasonable facilities or points of Interconnection for the purpose of originating or terminating IXC traffic. For each such access Tandem designated, the Parties shall mutually

agree upon a billing percentage as set forth in **Schedule 6.0** and shall further agree, within thirty (30) days of the Effective Date, upon billing percentages for additional routes, which billing percentages shall be set forth in **Schedule 6.0** as amendments hereto. Either Party may make this billing percentage information available to IXCs. The billing percentages shall be calculated according to one of the methodologies specified for such purposes in the MECAB document.

6.1.3 The Parties shall undertake all reasonable measures to ensure that the billing percentage and associated information are maintained in their respective federal and state access tariffs, as required, until such time as such information can be included in the National Exchange Association ("**NECA**") FCC Tariff No. 4. MCIm shall use its best efforts to include in such tariff the billing percentage and associated information as a non-member of NECA.

6.1.4 Each Party shall implement the "Multiple Bill/Single Tariff" option in order to bill the IXC for each Party's own portion of jointly provided Telecommunications Service.

* * * * * * * * *

26.6 Remedies

Except as provided in Section 10.9.5, no remedy set forth in this Agreement is intended to be exclusive and each and every remedy shall be cumulative and in addition to any other rights or remedies now or hereafter exiting under applicable law or otherwise.

* * * * * * * * *

28.1.4 If the Parties are unable to resolve issues related to ~~the~~ Disputed Amount within forty-five (45) days after the Parties' appointment of designated representatives pursuant to **Section 28.3**, then either Party may file a complaint with the Commission to resolve such issues or proceed with any other remedy pursuant to law or equity. The Commission or the FCC may direct payment of any or all Disputed Amounts (including any accrued interest thereon or additional amounts awarded, plus applicable late fees, to be paid to either Party.

* * * * * * * *

28.3 Dispute Escalation and Resolution

Except as otherwise provided herein, any dispute, controversy or claim (individually and collectively, a "**Dispute**") arising under this Agreement shall be resolved in accordance with the procedures set forth in this **Section 28.3**. In the event of a Dispute between the Parties relating to this Agreement and upon the written request of either Party, each of the Parties shall appoint a designated representative who has authority to settle the Dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives; however, all reasonable requests for relevant information made by one Part to the other Party shall be honored. If the Parties are unable to resolve issues related to a Dispute within thirty (30) days after the Parties' appointment of designated representatives as set

forth above, the Parties shall attempt in good faith to address any default or resolve any Dispute according to the rules, guidelines or regulation of the Commission; provided, however, a Party may pursue all available remedies in the event there is no satisfactory resolution pursuant to this **Section 28.3**. Notwithstanding the foregoing, in no event shall the Parties permit the pending of a Dispute to disrupt service to any MCIm Customer or Ameritech Customer.

* * * * * * * *

30.6 Governing Law

This Agreement shall be governed by and construed in accordance with the Act, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of Illinois shall govern, without reference to its conflict of law provisions.

* * * * * * * *

SCHEDULE 1.2

DEFINITIONS

* * * * * * * *

"As Defined in the Act" means as specifically defined by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

"As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulation of the FCC or the Commission.

* * * * * * * *

"Local Traffic" means a call the distance of which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided, that in no event shall costs, claims, damages (including fines, penalties, and criminal or civil judgments and settlements), injuries, liabilities and expenses (including attorneys' fees).

* * * * * * * *

"Reciprocal Compensation" is As Described in the Act.

APPENDIX C - EXCERPTS FROM INTERCONNECTION AGREEMENTS (OTHER STATES)

1. AT&T-U S West (Washington)

AGREEMENT FOR LOCAL WIRELINE NETWORK INTERCONNECTIO AND SERVICE RESALE BETWEEN AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND U S WEST COMMUNICATIONS, INC.

- FILED JULY 25, 1997 -

* * * * * * * *

21. GOVERNING LAW

21.1 This Agreement shall be governed by and construed in accordance with the Act and FCC or Commission rules and regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of Washington, without regard to its conflicts of laws principles, shall govern.

2. GTE-AT&T (Iowa)

INTERCONNECTION, SERVICES AND NETWORK ELEMENTS BETWEEN GTE CORPORATION AND AT&T CORP.

* * * * * * * *

23.9 Governing Law - The validity of this Agreement, the construction and enforcement of its terms, and the interpretation of the rights and duties of the Parties shall be governed by the laws of the State of Iowa in which the services are provided and shall be subject to the exclusive jurisdiction of the courts therein, except insofar as federal law may control any aspect of this Agreement, in which case federal law shall govern such aspect. The Parties submit to personal jurisdiction in Irving, Texas and Basking Ridge, New Jersey, and waive any and all objectives to Texas or New Jersey venue.

* * * * *

ATTACHMENT 1

DISPUTE RESOLUTION

* * * * * * * *

1. Purpose

1.1 This Attachment 1 is intended to provide for the expeditious, economical, and equitable resolution of disputes between GTE and AT&T arising under this agreement, and to do so in a manner that permit uninterrupted, high quality services to be furnished to each Party's customers.

2. Remedies

2.1 Either party to this Agreement may invoke the informal and formal complaint procedures of the Iowa Utilities Board at any time.

2.1.1 By mutual agreement, the parties may refer a dispute to negotiation and arbitration under the procedures provided herein. GTE and AT&T agree not to resort to any court, agency, or private group with respect to such disputes except in accordance with this Attachment.

* * * * * * * *

2.1.4 Nothing in this Attachment 1 shall limit the right of either GTE or AT&T to obtain provisional remedies (including injunctive relief) from a court before, during or after the pendency of any arbitration proceeding brought pursuant to this attachment 1. However, once a decision is reached by the Arbitrator,

such decision shall supercede any provisional remedy.

3. Informal Resolution of Disputes

3.1 Prior to initiating an arbitration pursuant to the American Arbitration Association ("AAG") rules, as described below, the Parties to this Agreement shall submit any dispute between GTE and AT&T for resolution to an Inter-company Review Board consisting of one representative from AT&T at the Director-or above level and one representative from GTE at the Vice-President-or-above level (or at such lower level as each Party may designate). The dispute will be submitted by either Party giving written notice to the other Party, consistent with the notice requirements of this Agreement, that the Party intends to initiate the Informal Resolution of Disputes process. The notice shall define the dispute to be resolved. The Parties may use a mediator to help informally settle a dispute.

* * * * * * * * *

3.2 The Parties may enter into a settlement of any dispute at any time. The Settlement Agreement shall be in writing, and shall identify how the Arbitrator's or mediator's fee for the particular proceeding, if any, will be apportioned.

3. Ameritech-AT&T (Indiana)

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of February 25, 1997

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services Inc. on behalf of and as agent for Ameritech Indiana

and

AT&T COMMUNICATIONS OF INDIANA, INC.

* * * * * * * * *

* * * * * * * * *

28.2.3 If the Parties are unable to resolve the issues related to the Disputed Amounts in the normal course of business within sixty (60) days after delivery to the Billing Party of notice of the Disputed Amounts, each of the Parties shall appoint a designated representative who has authority to settle the Dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives, however all reasonable requests for relevant information made by one Party to the other Party shall be honored.

* * * * * * * * *

28.3.2 Except for matters for which the Act specifies a procedure for resolving disputes or differences, disputes between AT&T and Ameritech that arise out of this Agreement and are not resolved by informal negotiation or consultation shall be resolved as described in Schedule 28.3.2 which sets forth procedures that are intended to enable the Parties to resolve any disputes in an expeditious manner, without resort to courts. The Parties agree that any Dispute that also arises under one or more of the Regional Agreements will be consolidated into one arbitration proceeding.

* * * * * * * * *

28.4 Equitable Relief. Notwithstanding the foregoing, this Article XXVIII shall not be construed to prevent either Party from seeking and obtaining temporary equitable remedies, including temporary restraining orders, if, in its judgment, such action is necessary to avoid irreparable harm. Despite any such action, the Parties will continue to participate in good faith in the dispute resolution procedures described in this Article XXVIII.

* * * * * * * * *

30.6 Governing Law. For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the FCC, the exclusive jurisdiction and remedy for all such claims shall be as provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the Commission, the exclusive jurisdiction for all such claims shall be with such Commission, and the exclusive remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of Indiana without reference to conflict of law provisions; provided, however, that the Parties shall consult with each other and attempt to agree on a common state law to govern an issue that affects each of the Regional Interconnection Agreements and such issue is not particular to a specific State's law.

4. Ameritech-AT&T (Michigan)

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services, Inc. on behalf of and as agent for Ameritech Michigan

and

AT&T COMMUNICATIONS OF MICHIGAN, INC.

* * * * * * * *

28.2.3 If the Parties are unable to resolve the issues related to the Disputed Amounts in the normal course of business within sixty (60) days after delivery to the Billing Party of notice of the Disputed Amounts, each of the Parties shall appoint a designated representative who has authority to settle the Dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives, however all reasonable requests for relevant information made by one Party to the other Party shall be honored.

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30.6 Governing Law For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the FCC, the exclusive jurisdiction and remedy for all such claims shall be as provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the Commission, the exclusive jurisdiction for all such claims shall be with such Commission, and the exclusive remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of Michigan without reference to conflict of law provisions; provided, however, that the Parties shall consult with each other and attempt to agree on a common state law to govern an issue that affects each of the Regional Interconnection Agreements and such issue is not particular to a specific State's law.

5. **Ameritech-AT&T (Ohio)**

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of January ___, 1997

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services, Inc. on behalf and as agent of Ameritech Ohio

and

AT&T COMMUNICATIONS OF OHIO, INC.

* * * * * * * *

28.2.3 If the Parties are unable to resolve the issues related to the Disputed Amounts in the normal course of business within sixty (60) days after delivery to the Billing Party of notice of the Disputed Amounts, each of the Parties shall appoint a designated representative who has authority to settle the Dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives, however all reasonable requests for relevant information made by one Party to the other Party shall be honored.

* * * * * * * *

30.6 Governing Law For all claims under this Agreement that are based upon issues within the jurisdiction of the FCC, the exclusive jurisdiction and remedy for all such claims shall be as provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues within the jurisdiction of the Commission, the exclusive jurisdiction for all such claims shall be with such Commission, and the exclusive remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of Ohio without reference to conflict of law provisions; provided, however, that the Parties shall consult with each other and attempt to agree on a common state law to govern an issue that affects each of the Regional Interconnection Agreements and such issue is not particular to a specific State's law.

6. Ameritech-AT&T (Wisconsin)

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of January 15, 1997

By and Between

AMERITECH INFORMATION INDUSTRY SERVICES, a division of Ameritech Services, Inc. on behalf of and as agent for Ameritech Wisconsin

and

AT&T COMMUNICATIONS OF WISCONSIN, INC.

* * * * * * * * *

28.2.3 If the Parties are unable to resolve the issues related to the Disputed Amounts in the normal course of business within sixty (60) days after delivery to the Billing Party of notice of the Disputed Amounts, each of the Parties shall appoint a designated representative who has authority to settle the Dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives, however all reasonable requests for relevant information made by one Party to the other Party shall be honored.

* * * * * * * * *

30.6 Governing Law For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the FCC, the exclusive jurisdiction and remedy for all such claims shall be as provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the Commission, the exclusive jurisdiction for all such claims shall be with such Commission, and the exclusive remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of Wisconsin without reference to conflict of law provisions; provided, however, that the Parties shall consult with each other and attempt to agree on a common state law to govern an issue that affects each of the Regional Interconnection Agreements and such issue is not particular to a specific State's law.

APPENDIX D - COMPLAINTS FILED WITH THE ILLINOIS COMMERCE COMMISSION

1. Complaint Filed by Teleport Communications Group, Inc.

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TELEPORT COMMUNICATIONS GROUP INC.	)	
Complainant	)	
v.	)	Docket No. 97-0404
AMERITECH ILLINOIS	)	
Respondent	)	

COMPLAINT

Teleport Communications Group ("TCG")[1], on behalf of two of its Illinois operating affiliates, TCG Illinois and TCG Chicago, pursuant to the Public Utilities Act (the "Act" or "PUA"), 220 ILCS 5/101 et seq., and Section 200.170 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Admin. Code Ch. 1, Part 200, hereby complains that Ameritech Illinois ("Ameritech")[2] has

[1]Teleport Communications Group Inc., 233 South Wacker Drive, Suite 2100, Chicago, Illinois 60606.

[2]Ameritech Illinois, 225 West Randolph Street, Chicago, Illinois 60606.

violated the terms of its Interconnection Agreement with TCG, as approved by this Commission in Docket No. 96-AA-002, in an order entered on January 8, 1997.

The issue giving rise to this Complaint is a simple -- though important -- dispute over a contract definition. TCG requests that the Commission determine that the term "Local Traffic" as used in Section 1.43 of TCG's Interconnection Agreement with Ameritech includes local calls from Ameritech end user customers to Information Service Providers ("ISPs") who are TCG end user local customers. TCG further requests that the Commission find that Ameritech is obligated to pay TCG the applicable reciprocal compensation rate for past and future ISP local calls under the reciprocal compensation provisions of the agreement, plus interest on past due amounts. TCG requests that the Commission expeditiously make this determination, and that during the pendency of this Complaint proceeding it order Ameritech to pay TCG all past-owing amounts withheld by Ameritech, as well as all future amounts to be billed by TCG for ISP traffic while the Commission considers this matter.[3]

This issue is important not only because of the financial impact on TCG of Ameritech's unilateral abrogation of its contractual obligations. It is also important because of what it shows about Ameritech's willingness to exercise its monopoly power against its smaller competitors. Rather than seek this Commission's guidance on this contractual interpretation issue, or wait to address this issue when the time

[3]The New York Public Service Commission has required NYNEX and Rochester Telephone to pay all reciprocal compensation amounts relating to ISP traffic during the pendency of its examination of this issue. *See* fn. Sec. V, *infra*.

arises to renegotiate the contract, Ameritech has unilaterally and without just cause decided that it will no longer pay TCG for the call termination services that TCG provides to it.[4] Because TCG is forced to continue to complete the calls of Ameritech customers without compensation, while Ameritech continues to be paid by those same customers for their calls to the ISPs served by TCG, this is a manifestly unfair action by Ameritech. Ameritech is simultaneously increasing TCG's costs, using TCG's services and facilities without payment, and increasing its own revenues. TCG therefore requests that the Commission find that Ameritech has acted in bad faith in this unjust implementation of its Interconnection Agreement with TCG, and direct Ameritech to cease all such anti-competitive actions in the future.

4. STATEMENT OF FACTS

TCG's Interconnection Agreement with Ameritech was the subject of an arbitration hearing before this Commission, which was concluded by order released November 4, 1996.[5]

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[4]By contrast, Southern New England Telephone (SNET) took the initiative to ask its regulator for advice on whether ISP traffic is subject to reciprocal compensation. Its regulator properly told it that reciprocal compensation applies. Ameritech could certainly have done the same. But Ameritech did not choose to ask this Commission for such advice before unilaterally withholding payment from its small competitors -- perhaps fearful that it would have received the same answer as SNET.

[5]In re Petition of Teleport Communications Group Inc. for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket No. 96-AB-001, November 4, 1996.

The final agreement, as executed by the parties in response to the Commission's arbitration order, was approved in an order entered on January 8, 1997.[6]

This issue arises as a result of recent efforts by Ameritech to avoid its contractual obligation to compensate TCG for local calls placed by Ameritech end users to ISPs served by TCG. TCG provides local business exchange services, including local telephone numbers and local dial tone services, to a number of ISPs, which are entitled under Federal Communications Commission ("FCC") policies to obtain intrastate local exchange services.[7]

By letter dated July 3, 1997, Ameritech informed TCG that it considers Ameritech end user traffic destined for ISPs whose local dial tone service is provided by TCG to be "non

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[6]TCG Illinois/TCG Chicago and Illinois Bell Telephone Company (Ameritech Illinois), Agreement Dated December 9, 1996, Docket No. 96-AA-002, January 8, 1997.

[7]The FCC originated this policy as long ago as 1983. See MTS and WATS Market Structure, 97 FCC 2d 682, 711-22 (1983). Under FCC rules, ISPs are treated as end users rather than carriers, and are thus able to order local exchange services and are not subject to switched access charges. See 47 C.F.R. § 69.2(m). The FCC recently affirmed its policies, stating that that "ISPs may purchase services from incumbent LECs under the same *intrastate* tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries." Access Charge Reform, First Report and Order, CC Docket 96-262, FCC 97-158 (rel. May 16, 1997) at 342.

local traffic" not subject to reciprocal compensation.[8] Instead, Ameritech states that it considers such traffic to be "exchange access traffic" under the Interconnection Agreement, but that the FCC's exemption of ISP traffic from access charges means that this traffic is not subject to any compensation.[9] Thus, Ameritech wants TCG to terminate calls from Ameritech customers to ISPs that are TCG's customers for free, while continuing to charge TCG for all "non ISP" traffic from TCG to Ameritech.[10]

By letter dated August 8, 1997, TCG responded to the Ameritech letter and pointed out that this traffic is subject to reciprocal compensation.[11] TCG requested a meeting between designated representatives pursuant to Section 29.18 of the Interconnection Agreement to see if a negotiated settlement of this issue was possible. Subsequently, in discussions with Ameritech, it was agreed between the parties that no negotiated settlement of this issue was possible, inasmuch as Ameritech was firm in its position that traffic delivered to

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[8]*See* page 1 of the July 3, 1997 Ameritech letter, attached as Exhibit 1.

[9]Ibid.

[10]Because more calls from Ameritech customers to TCG customers are ISP calls than the reverse, the net effect of Ameritech's unilateral action is that it is "exempting" itself from paying for the majority of its customers' use of TCG's network. By singling out ISP customers, which TCG has been very successful in serving, Ameritech's policy will disproportionately impact TCG. That result is hardly accidental, but is a purposeful, and intentional, effort to harm competitors like TCG.

[11]TCG's response is attached as Exhibit 2.

ISPs was not subject to reciprocal compensation.[12] In the absence of any possibility of a negotiated settlement of this dispute, TCG has filed this Complaint seeking a determination that Ameritech's interpretation of the Interconnection Agreement is in clear breach of the Interconnection Agreement and contrary to law, and that Ameritech must pay TCG for ISP traffic, including interest on all past due amounts. Additionally, TCG is seeking an immediate Order directing Ameritech to pay TCG for all ISP-related minutes of use under the Interconnection Agreement, both past due and new, during the pendency of this proceeding.

5. THE COMMISSION HAS UNQUESTIONED AUTHORITY TO INTERPRET AND ENFORCE ILLINOIS INTERCONNECTION AGREEMENT, AS REQUESTED BY TCG HEREIN.

This Commission has clear and unquestioned authority under both the federal Telecommunications Act of 1996 ("the Act") and the PUA to interpret or enforce the provisions of Interconnection Agreements.[13] The Commission's

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[12]*See* page 2 of TCG letter, Exhibit 2. *See also*, TCG's letter dated August 19, 1997, attached as Exhibit 3, Ameritech's letter dated August 20, 1997, attached as Exhibit 4, Ameritech's letter dated August 26, 1997, attached as Exhibit 5 and TCG's letter dated August 29, 1997, attached as Exhibit 6.

[13]*See Iowa Utilities Board v. FCC*, Case No. 96-3321, United States Court of Appeals for the Eighth Circuit, slip opinion at 122 ("We also believe that state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252.") (July 18, 1997). *See also* 220 ILCS 5/10-108, which provides TCG with standing to initiate a complaint against Ameritech.

authority under the federal Act is applicable even where the underlying jurisdiction of the call is interstate.[14] The Commission-approved Interconnection Agreement between TCG and Ameritech specifically provides for Commission review and determination of disputes in the situation presented here, where the parties have been unable to resolve the dispute themselves.[15]

It is important to recognize that TCG's request is really a simple dispute over a contract definition. TCG's request does not ask that the Commission determine the interstate or intrastate character and jurisdiction of the ISP traffic itself, nor does TCG ask that the Commission "regulate" ISP traffic

[14]The Telecommunications Act of 1996 gives state commissions authority to review and arbitrate interconnection agreements governing intrastate, interstate and international traffic. The Commission has in fact already arbitrated matters relating to interstate calls. *See* Petition of Teleport Communications Group Inc. for arbitration to establish an interconnection agreement with Ameritech Illinois, Order, Docket No. 96-AB-001, entered November 4, 1996. Moreover, the Eighth Circuit states, at page 122, that state commission enforcement power "extends to ensuring that parties comply with the regulations that the FCC is specifically authorized to issue under the Act," making it clear that state commissions are empowered to address interconnection agreement issues that relate to matters subject to FCC jurisdiction.

[15]*See*, TCG-Ameritech Interconnection Agreement. § 29.18, pp 49-50, a copy of which is attached as Exhibit 7. This section provides that it applies to "any dispute, controversy or claim" which arises under the Agreement. It goes on to provide, in the event no resolution is possible, for the parties to bring the matter to the Commission "in accordance with the procedures applicable to the resolution of disputes among carriers in the State of Illinois."

is the classic sense.[16] Instead, TCG is asking simply that the Commission declare the appropriate treatment of such "Local Traffic" under the terms of the Interconnection Agreement which this Commission approved, and enforce that determination. TCG's request thus relates to an interpretation and enforcement of the Interconnection Agreement, which was entered into subject to the review and approval of the Commission. As noted above, the authority to take such actions, in the view of the Eighth Circuit, rests *exclusively* in this Commission.[17]

[16]Additionally, the Commission's determination of this matter is not dependent on, nor must it wait for, any action by the FCC. TCG notes that the FCC currently has pending before it a request filed on June 20, 1997 by the Association for Local Telecommunications Services (ALTS) requesting clarification of the rights of a CLEC to receive reciprocal compensation on ISP traffic. The FCC sought comment on that matter by Public Notice released July 2, 1997. The ALTS request and FCC Public Notice were prior to the Eighth Circuit's July 18 declaration regarding the exclusive rights of state commissions to enforce and interpret Interconnection Agreements. The FCC has not as yet acted on the ALTS request. This Commission should not, and need not, await action by the FCC before taking up TCG's request. Indeed, other Commissions that have faced this question have proceeded to address it. *See* Section V, *infra*.

[17]TCG is not bringing this Complaint pursuant to the provisions of Section 13-515 of the PUA. 220 ILCS 5/13-515. That new section of the PUA provides special procedures in cases involving disputes over interconnection agreements. That provision does not become effective, however, until Ameritech receives permission pursuant to Section 271(d) of the federal Telecommunications Act of 1996 to provide interLATA service in the Ameritech region. Ameritech has not received such permission at this time.

The Commission also has authority under the PUA over the interpretation of terms used in the Interconnection Agreement between TCG and Ameritech, as approved by the Commission in Docket No. 96-AA-002. The PUA generally grants the Commission the "power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish." 220 ILCS 5/10-101. Additionally, parties may initiate a complaint for "any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission." 220 ILCS 5/10-108. Because the Interconnection Agreement between TCG and Ameritech was the subject of a Commission order, the Commission has jurisdiction to hear complaints regarding the violation of that Agreement. Furthermore, Section 13-203 of the PUC, as amended this year, includes "access and interconnection arrangements and services" within the definition of a telecommunications service. 220 ILCS 5/13-203. Finally, new section 13-514 prohibits telecommunications carriers from "violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays or impedes the availability of telecommunications services to consumers." 220 ILCS 5/13-514(8).

6. LOCAL CALLS TERMINATED TO ISPS ARE LOCAL TRAFFIC SUBJECT TO RECIPROCAL COMPENSATION UNDER TCG'S AGREEMENT WITH AMERITECH.

The issue raised in this Complaint involves compensation for traffic that originates with customers of Ameritech and that terminates with customers of TCG. In this case, those calls happen to be Ameritech customers reaching the Internet through ISPs that are TCG's customers. Section 5.6.1 of the TCG/Ameritech interconnection agreement provides Ameritech with the obligation to compensate TCG for that traffic. That section provides as follows:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or TCG which a Telephone Exchange Service Customer originates on Ameritech's or TCG's network for termination on the other Party's network. The Parties shall compensate each other for such transport and termination of Local Traffic at the rate provided in the Pricing Schedule.

In its July 3, 1997 letter, Ameritech claims that traffic from Ameritech customers to ISPs that are TCG's customers is not "Local Traffic" as contemplated in the agreement. Instead, Ameritech claims that such traffic ". . . is Exchange Access Traffic. . . ."

Ameritech is wrong. ISP traffic cannot be "exchange access traffic." The Telecommunications Act of 1996, under the auspices of which this Interconnection Agreement was adopted, defines exchange access as follows:

> (16) Exchange access. The term "exchange access" means the offering of access to telephone ex-

> change services or facilities for the purpose of the origination or termination of *telephone toll services*. 47 USCS § 153 (16) (emphasis added).

Ameritech customers are not placing calls to ISPs for the purpose of originating or terminating "telephone toll services." Instead, customers establish data links to the ISP and request certain information available on the Internet. The ISP then provides the information sought by the end user from the Internet on a packetized data network. No telephone toll services are involved in the ISP calling. Since none of that ISP activity can be considered "telephone toll service," the local connection to the ISP cannot be "exchange access traffic" within the meaning of the statute. The Interconnection Agreement itself supports that interpretation as well. Paragraph 5.6.1 of the TCG/Ameritech Interconnection Agreement provides that access services "shall continue to be governed by the terms and conditions of the applicable federal and state tariffs." Federal regulations prohibit TCG and Ameritech from treating Internet data transmission calls as access services,[18] and for that reason as well Ameritech's argument must fail.

Traffic destined for ISPs cannot, therefore, be considered Exchange Access Traffic. Instead, it is Local Traffic subject to the reciprocal compensation termination charges in the Agreement. Under Section 1.43 of the TCG-Ameritech Illinois Interconnection Agreement, "Local Traffic" is defined as "local service area calls as defined by the Commission." The applicable Illinois statutes make clear that calls from Ameritech's end user customers to ISPs served by TCG con-

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[18] *See* fn. 5, *supra*.

stitute Local Traffic for purposes of the Agreement. Under the definitions included in the PUA, "Local Exchange Telecommunications Service" is defined as the "telecommunications service between points within an exchange, as defined in Section 13-206 [220 ILCS 5/13-206], or the provision of telecommunications service for the origination or termination of switched telecommunications services. 220 ILCS 5/13-204. Since the TCG-Ameritech Interconnection Agreement explicitly refers to this Commission's definitions for purposes of classifying calls as local, the Commission's practice and statutory background are important to resolving this question. Based on these facts, TCG believes there can be no doubt that an Ameritech end user placing a local call to an ISP served by TCG is receiving Local Service within the meaning of Illinois law.

7. AMERITECH HAS TREATED CALLS TO INTERNET SERVICE PROVIDERS AS LOCAL EXCHANGE CALLS.

Significantly, Ameritech's own testimony, admissions, and practices compel the conclusion that ISP traffic must be subject to reciprocal compensation. Ameritech has accepted that conclusion and is estopped from claiming now to the contrary.

First, in Ameritech's written response to the Petition of TCG for Arbitration of the Interconnection Agreement, Ameritech openly discussed the issue of heavy "one-way" users such as ISPs. In arguing why the Commission should not have adopted TCG's proposal to implement a "bill and keep" arrangement in place of reciprocal compensation

terms[19] for Local Traffic, Ameritech witness Susan Springsteen contended that there was an "imbalance between the amount of local exchange traffic that [TCG] and other competitive local exchange carriers ("CLECs") terminate on Ameritech's network and the amount of traffic that Ameritech terminates on the networks of TCG and other CLECs."

Ms. Springsteen testified that from January through June 1996 this imbalance for local traffic was huge – "approximately 1,000 percent." Discovery by the Commission Staff revealed that this imbalance was in TCG's favor -- that there were 10 calls from Ameritech customers to TCG customers for every one call from a TCG customer to an Ameritech customer.

Second, Ameritech was well aware of the fact that such an imbalance would require it to "write checks" to its competitors, but felt that such a result was entirely appropriate. Ameritech witness Springsteen testified in Indiana based on her analysis of TCG's traffic patterns in Illinois,[20] which as noted above indicate that Ameritech customers terminate 10 times the traffic to TCG than vice versa. The Ameritech witness stated that it would be acceptable for Ameritech to pay TCG even if there was a 10 to 1 imbalance, because

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[19]Ameritech now seeks to subject ISP traffic to "bill and keep" which it vigorously opposed in the interconnection negotiations and before the Commission in numerous dockets.

[20]Petition of TCG Indianapolis for Arbitration Pursuant to 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Corporation, Cause No. 40559, Transcript of Arbitration held August 28, 1996, at pages 234-235.

"Ameritech would be paying for what it's using on someone else's network." Her testimony went as follows:

Q: If -- just to use hypothetical numbers, if 1,000 minutes are coming from Ameritech to be terminated on a competitive carrier but the competitive carrier is only terminating 100 minutes on Ameritech, does that work to Ameritech's disadvantage?

Ms. Springsteen: Not necessarily.

Q: So you would agree that in that situation bill and keep would work to Ameritech's advantage?

Ms. Springsteen: No, because I -- I feel in that case that if a carrier is going to terminate traffic on another carrier's network, that's based upon the type of customers that end carrier has marketed, and bill and keep has nothing to do with it as far as the traffic terminating on each other's network. It's strictly the amount of traffic that's going from one network to another network.

Q: Would you agree in my hypothetical example where there's 1,000 minutes coming into competitive carrier lines and only 100 minutes coming out, that if there were a usage sensitive charge, let's say a dollar a minute, that Ameritech would have to pay money to the competitive local carrier?

Ms. Springsteen: Yes. If it's use sensitive.

Q: And if it was bill and keep. Ameritech would not have to write any checks to that competitive local carrier?

Ms. Springsteen: I would agree with that statement.

Q: Then how would the use of a usage sensitive rate compared to bill and keep advantage Ameritech in the hypothetical I've created?

Ms. Springsteen: Ameritech would be paying for what it's using on someone else's network.[21]

Ameritech, therefore, was well aware during the arbitration and negotiation of its Interconnection Agreement with TCG that already there were ten times the number of Local Traffic minutes from Ameritech's Illinois customers to TCG's Illinois customers as there were Local Traffic minutes from TCG customers to Ameritech customers. The reason for this disparity was simple: TCG had already acquired several ISPs as customers by January 1996. Ameritech was well aware of that fact -- as Ms. Springsteen's testimony in Indiana states, such an imbalance results from the "type of customers that end carrier has marketed."

Third, Ameritech's response to Staff discovery here in Illinois shows that Ameritech itself categorized ISP traffic as

[21]Transcript. pp. 235-237.

"local exchange traffic." In the schedules supporting Ms. Springsteen's Illinois statement, Ameritech categorized terminating traffic as Local, Toll or IXC. Although only Ameritech is in possession of the raw data (and the schedules supporting Ms. Springsteen's testimony are proprietary), given the volume of traffic listed in each category, TCG is 100 percent certain that the traffic to the ISP customers of TCG was categorized at the time as "Local" in Ameritech's records, and characterized as "Local" to this Commission. And Ameritech much be presumed to have come to the realization that ISPs were the "type of customers TCG had marketed" in order to result in this traffic pattern. Thus, by its conduct Ameritech shows that it considered ISP traffic to be local exchange traffic -- until it decided to abrogate its interconnection agreement with TCG and sent its letter dated July 3, 1997.

Fourth, Ameritech has established a pattern of conduct and past practice which indicates that it has <u>always</u> treated calls to ISPs as "local calls." On a practical level, the fact is that Ameritech treats these calls to ISPs as local calls for all other purposes. Ameritech makes no distinction between ISPs served by CLECs like TCG and ISPs served by Ameritech itself in handling these calls. The call from the Ameritech end user to the ISP is dialed and routed like every other local call to an end user. The ISP subscribes to and receives ordinary business local exchange services from Ameritech or the CLEC. The calls are routed through the Ameritech network as ordinary local calls -- as contrasted with the special and higher quality "trunk side" routing and advanced signaling and call processing capabilities for ordinary switched access calls. End user calls to ISPs are treated like other local calls for billing purposes, and Ameritech counts these ISP minutes

as local for purposes of billing, accounting, separations, and network operations. By all the indicia that are relevant to this question, Ameritech itself treats these calls to ISPs as Local Traffic.

Fifth, Ameritech receives revenue from its customers who use the Internet, because every call those customers make to their ISP is billed by Ameritech as a local call. Ameritech also receives additional revenues from the second (and even third) lines that they sell to customers for use in connecting to the Internet. And because of its local measured service pricing, Ameritech is able to receive substantial revenue from customers "surfing the Internet" for hours at a time when the ISP is located beyond the untimed zone of that Ameritech customer. When those ISPs are TCG's customers, TCG transports and terminates those calls, thus reducing Ameritech's costs. Yet Ameritech refuses to pay TCG for that transport and termination service.

Sixth, despite the general telecommunications industry practice of treating ISP traffic as "local," Ameritech failed to raise the issue of treating ISP traffic as anything other than "Local Traffic" during interconnection negotiations or in the arbitration proceeding. If, indeed, Ameritech genuinely believed that ISP traffic was not "Local Traffic" during the negotiations or arbitration, why did it fail to propose then a mechanism that would be needed to account for ISP traffic as something other than "Local Traffic?"

In summary, Ameritech has always known that a large portion of the traffic it terminates on TCG's network is destined for ISPs, and Ameritech has profited handsomely by billing its own customers for that traffic as well as selling them additional lines and ancillary services in conjunction

with that usage. Ameritech's expression of surprise that TCG is billing it for the termination of ISP traffic thus brings to mind the classic scene in the movie "Casablanca" when chief of police Captain Louis Renault (Claude Rains) closes Rick's café, blaming it on illegal gambling. As an explanation, Louis claims, "I'm shocked, shocked to find that gambling is going on in here" just as he is handed his gambling winnings for the night. Unfortunately, in this case, it is TCG's money that Ameritech is walking off with.

8. OTHER STATE COMMISSIONS HAVE CHARACTERIZED ISP TRAFFIC AS LOCAL FOR THE PURPOSES OF RECIPROCAL COMPENSATION

Every single state commission that has considered this issue has ruled that reciprocal compensation rates apply to local calls terminating with ISP end users.

Most recently, the Connecticut Department of Public Utility Control released a Draft Decision on August 19, 1997 directly on point.[22] The proceeding was prompted by a Petition from Southern New England Telephone Company for a Declaratory Ruling that ISP traffic is not to be subject to reciprocal compensation arrangements.[23] The Connecticut

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[22]Petition of The Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic, Docket No. 97-05-22, released August 19, 1997. The Decision, released by the three DPU Commissioners, is labeled a "Draft Decision" because the DPU will accept written exceptions on September 3, 1997 prior to making the decision final on September 10, 1997.

[23]It is noteworthy that SNET sought declaratory advice from its regulatory body concerning this issue, in contrast to Ameritech which unilaterally decided the question for itself. Ameritech could

DPU, in ruling against SNET, commented that "ISPs are business local exchange customers that purchase service from SNET, use the network in a similar manner to the Company's other end users and, therefore, should not be treated any differently than other business local exchange customers."[24] The DPU went on to say that "The Department considers calls originating and terminating between these customers (ISPs and other SNET customers) within the same local calling area to be local, and, therefore, should be subject to the mutual compensation arrangements adopted in the Plan."[25]

The New York Public Service Commission has an inquiry presently underway on the question of whether Internet traffic should be subject to reciprocal compensation. In the interim, the Commission has recently stated that NYNEX must continue to pay reciprocal compensation to CLECs for ISP traffic.[26] Earlier, the Staff of the New York Public Service Commission reached a similar conclusion.[27]

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equally easily have sought this Commission's advice before taking the extraordinary step of refusing to pay its lawful bills to CLECs. Ameritech's failure to avail itself of such alternatives should be considered in assessing its good faith -- or lack thereof -- in dealing with its competitors.

[24]Draft Decision at 9.

[25]Ibid.

[26]Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Case 97-C-1275, Ordering Denying Petition and Instituting Proceeding, June 10, 1997 ("New York Telephone Company and Rochester Telephone Company shall continue to pay other local exchange carriers for

The Oregon Public Utility Commission rejected US West's attempt to have ISP traffic explicitly exempt from the reciprocal compensation agreement.[28] The Oregon Commission adopted the arbitrator's conclusion that "[there is no reason to depart from existing law or speculating what the FCC might ultimately conclude in a future proceeding,"[29] choosing instead to treat customer calls to ISPs as local calls for purposes of reciprocal compensation agreements.

The Minnesota Public Utilities Commission similarly held that:

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the exchange of [Internet] traffic based upon the approved reciprocal compensation structures contained in their respective tariffs and interconnection agreements.")

[27]Letter from Allan Bausback, Acting Director, Communications Division, NYPSC, to William Allan, Vice President, Regulatory Matter, New York Telephone Company, May 29, 1997 ("[T]he interpretation expressed in NYT's letters has not been approved by the Public Service Commission and is at odds with NYT's own treatment of this traffic as intrastate in its assessment of usage charges to other customers. [W]e expect NYT to pay compensation to local exchange carriers for traffic delivered by NYT to the interconnecting carriers for termination to any Internet Service Providers. . . .")

[28]Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996, ARB 1, Order No. 96-324, slip op. (Public Utilities Rpts., Ore. PUC December 9, 1996).

[29]Id.

> US West has failed to meet its burden of demonstrating the need to discriminate regarding the handling of ESP traffic. US West does not presently have different local rates for ESPs it has shown no basis for imposing such discrimination on rates in this proceeding. US West has not shown that separating this traffic is required under the law or that it is technically feasible.[30]

The Washington Utilities and Transportation Commission reached the same conclusion in conducting an arbitration proceeding between MFS and US West, holding that there should be no change in the current "local" treatment of ISP traffic.[31] The same conclusion was also reached in Arizona.[32]

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[30]Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with US West Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Docket No. P442, 421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729, 1996 Minn. PUC LEXIS 161 at *171 (Minn. PUC December 6, 1996).

[31]In the Matter of Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications Company, Inc. Pursuant to 47 USC Section 252, Docket No. UT-960323, issued November 8, 1996 (Washington Utilities and Transportation Commission) (MFS made same argument as in Oregon in support of applying reciprocal compensation to termination of ESP traffic, and arbitrator decided "it is premature to change the treatment of ESPs at this time." Id. at 26).

9. IF AMERITECH WISHES TO CHANGE THE TERMS OF ITS INTERCONNECTION IT MUST RENEGOTIATE.

It is clear that the existing Interconnection Agreement with TCG requires Ameritech to pay TCG for calls to ISPs served by TCG. Ameritech was well aware of the fact that TCG had "marketed to customers" with such inbound calling characteristics, and accepted the proposition it must "write checks" to TCG to "pay for what it is using on TCG's network."

Given that the existing agreement requires such action, Ameritech's attempt to unilaterally apply "bill and keep" to ISP traffic by reclassifying ISP traffic as something other than "Local Traffic" is nothing less than an unlawful and improper effort to "renegotiate" the existing Interconnection Agreement -- without the negotiation, and, if necessary, arbitration by this Commission -- not to mention a clear breach of contract.

f Ameritech now truly believes that ISP traffic is not "Local Traffic," the best way for Ameritech to have raised the issue would have been in connection with the negotiations for a new interconnection agreement to replace the current contract. Although Ameritech has not asked TCG to renegotiate the current contract, TCG would consider such a request since there are provisions of the Interconnection Agreement which do not please TCG.[33] The Interconnection

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[32]Arbitrated Interconnection Agreement for Arizona between Electric Lightwave, Inc. and US West § 1 e. ("The Parties agree that this traffic will be included for traffic exchange. . . .").

[33]Of course, in this circumstance, and as a matter of basic contract law, Ameritech would have to honor the current agreement before

Agreement expires in January, 2000 so that negotiations for the next agreement will begin within the next 18 months to accommodate the nine month negotiation period set forth in the Telecommunications Act of 1996. The Commission should clearly state that Ameritech's transparent and premature effort to change the approved Interconnection Agreement well before the expiration of the contract is inappropriate, and should be taken up, if at all, in the negotiations (or arbitrations) associated with the next TCG/Ameritech Interconnection Agreement.

10. CONCLUSION

TCG requests that the Commission promptly issue an order stating (1) that the term "Local Traffic" as used in its interconnection agreement with Ameritech includes local calls terminated to ISPs subscribing to local exchange service from TCG, (2) that all such traffic is subject of the payment of local reciprocal compensation to TCG by Ameritech, in the same manner as any other local call from an Ameritech local exchange customer to a TCG local exchange customer, (3) that Ameritech is obligated to pay TCG for all ISP traffic delivered to it, including traffic delivered prior to the date of this filing for which Ameritech has refused payment, together with interest on all amounts owed and unpaid, and (4) that Ameritech be reprimanded for anti-competitive and unilateral withholding of payments TCG.

Additionally, TCG requests that the Commission immediately order Ameritech, during the pendency of the Commis-

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good faith negotiations resulted in a new Interconnection Agreement.

sion's consideration of this Complaint, to pay TCG for all Ameritech end user traffic delivered to TCG prior to the filing of this complaint, as well as for all ISP traffic delivered to TCG during the Commission's consideration of this dispute. Such an interim order is appropriate under the circumstances because (1) Ameritech is financially benefitting from the use of TCG's network without payment therefore, and (2) Ameritech has previously paid for ISP traffic delivered to TCG and therefore this interim request merely restores the status quo prior to Ameritech's unilateral decision to refuse to pay for the use of TCG's network.

Respectfully submitted,

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Dated: September 5, 1997

[Certificate of Verification Omitted]

B. Complaint Filed by WorldCom Technologies, Inc.

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

WorldCom Technologies, Inc., successor in interest to MFS Intelenet of Illinois, Inc., Complainant	)	
v.	)	Docket No.
Illinois Bell Telephone Company d/b/a Ameritech Illinois. Respondent.	)	

COMPLAINT OF
WORLDCOM TECHNOLOGIES, INC.

WorldCom Technologies, Inc. ("WorldCom"), successor in interest to MFS Intelenet of Illinois, Inc., through undersigned counsel, hereby files this complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") for Ameritech's failure to pay WorldCom reciprocal

compensation for local calls which originate on Ameritech's network and terminate on WorldCom's network.[1]

WorldCom entered into an Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, dated as of April 8, 1997, by and between Ameritech Information Industry Services, a division of Ameritech Services, Inc., on behalf of Ameritech Illinois, and MFS Intelenet of Illinois, Inc. (the "Agreement"), pursuant to Section 252 of the Telecommunications Act of 1996 ("Federal Act"). The Agreement was filed with and approved by the Illinois Commerce Commission ("Commission") on July 30, 1997.[2]

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[1]For convenience, "WorldCom" will be used to refer to both WorldCom Technologies, Inc., and to its corporate predecessor, MFS Intelenet of Illinois, Inc., in this Complaint.

[2]Ameritech Illinois, Agreement Dated April 8, 1997 between Ameritech Illinois and MFS-Intelenet of Illinois, Inc., *Order*, Docket No. 97 NA-016 (I.C.C. July 30, 1997). This Agreement amended and restated the previous agreement between the parties. *See* Ameritech Illinois, Agreement Dated May 17, 1996 between Ameritech Illinois and MFS Intelenet of Illinois Inc., *Order*, Docket No. 96 NA-002 (Ill. Commerce Comm'n. Aug ___, 1996). On September 24, 1997, this Commission granted the application of MFS Intelenet of Illinois, Inc. ("MFS"), WorldCom, Inc., and WorldCom Technologies, Inc. to withdraw the certificates of service authority held by MFS and WorldCom, Inc., and to award equivalent certificates of service authority to WorldCom Technologies, Inc. as the surviving entity of a corporate reorganization. *Order*, Docket No. 97-0349 (Ill. Commerce Comm'n. Sept. 24, 1997).

WorldCom alleges that Ameritech has violated the Agreement, the orders of the Commission, and the Public Utilities Act ("PUA") by refusing to pay reciprocal compensation for local calls placed by Ameritech's telephone exchange service customers to WorldCom's telephone exchange service customers who happen to be Internet Service Providers ("ISPs"). WorldCom requests that the Commission provide immediate relief by issuing an order finding that all telephone calls placed within the same local calling area from an Ameritech-provided telephone exchange service customer to a WorldCom-provided telephone exchange service customer qualify as local traffic, and ordering Ameritech to compensate WorldCom for terminating its ISP customers' local traffic originated by Ameritech customers, pursuant to the Agreement, the orders of the Commission, and the PUA.

1. Both WorldCom and Ameritech are local exchange carriers ("LECs") authorized by the Commission to provide local exchange services in Illinois pursuant to 220 ILCS 5/13-405. WorldCom has been providing local telephone services as a competitive local exchange carrier ("CLEC") in competition with Ameritech in Illinois since 1994.

2. Pursuant to Section 4-101 of the PUA, this Commission has the authority to supervise all public utilities, including telecommunications carriers, and to monitor their compliance with the PUA, any other law, and the orders of the Commission. 220 ILCS 5/4-101.

3. Pursuant to Section 252(a) of the Federal Act, WorldCom and Ameritech negotiated the Agreement and filed it with the Commission. Acting under authority granted in Section 252(e) of the Federal Act, the Commission approved

the Agreement on July 30, 1997. The Commission has jurisdiction to enforce the terms of the Agreement that Ameritech has breached as alleged in this Complaint.

4. This Commission requires local exchange carriers to interconnect with each other and compensate each other for the use of each others' network.[3]

5. This Commission established reciprocal compensation as the system for compensation for the exchange of local traffic between incumbent LECs and CLECs.[4]

6. Section 251(a) of the Federal Act obligates all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[5]

7. Likewise, Section 251(b)(5) of the Federal Act obligates Ameritech and WorldCom, as local exchange carriers, "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[6]

8. WorldCom and Ameritech have interconnected their networks so that an end user subscribing to WorldCom's telephone exchange service can place calls to end users sub-

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[3]*Re Illinois Bell Telephone Company*, Order, Docket Nos. 94-0096, 94-0146, 94-0301 (Ill. Commerce Comm'n. Apr. 7, 1995), at 78, 82, 83, 96-101. *See also* Ill. Admin. Code tit. 83, § 790.5 *et seq.* (Interconnection).

[4]*Id.* At 98.

[5]47 U.S.C. § 251(a).

[6]47 U.S.C. § 251(b)(5).

scribing to Ameritech's telephone exchange service and vice versa.

9. Both WorldCom and Ameritech provide tariffed local exchange services over their respective networks to end user customers, including some business customers operating as ISPs. As their name suggests, ISPs provide information obtained from numerous sources, including sources accessed through the Internet. Typically, the end users connect to an ISP with a local phone call.

10. WorldCom received a letter from Ameritech dated July 3, 1997, in which Ameritech refused to pay Reciprocal Compensation to WorldCom for traffic that was terminated with ISPs. Ameritech estimated that 37.92% of the traffic originating with Ameritech and terminating to a WorldCom customer terminated with ISPs. Ameritech further stated that it would refuse to compensate WorldCom for 37.92% of the future traffic originating with Ameritech and terminating to a WorldCom customer. A copy of the Ameritech letter is attached as Exhibit A.

11. WorldCom responded to the Ameritech letter by letter dated July 9, 1997, demanding immediate payment of all reciprocal compensation owed to WorldCom by Ameritech for local exchange traffic that was originated by Ameritech's customers and terminated with WorldCom's customers, including WorldCom's ISP customers. A copy of the WorldCom letter is attached as Exhibit B.

12. By letter dated July 30, 1997, Ameritech disputed more than $1,117,000 in compensation owed to WorldCom and has withheld payment of this reciprocal compensation owed to WorldCom for local exchange traffic originated by Ameritech's customers and terminated by WorldCom with

WorldCom's ISP customers. A copy of the July 30, 1997 letter is attached as Exhibit C.

13. On September 8, 1997, WorldCom wrote to Ameritech to notify it that its refusal to pay reciprocal compensation constituted a violation of Section 13-514 of the PUA and offered Ameritech 48 hours to correct the situation. A copy of the September 8, 1997 letter is attached as Exhibit D.

14. Ameritech continues to refuse to pay WorldCom reciprocal compensation for such traffic.

15. Ameritech has charged, and continues to charge, its originating end users local measured service charges under its local exchange service tariffs on file with the Commission for making local calls terminating at ISPs, regardless of which company provides the terminating phone line to the ISP.

16. Ameritech declares traffic to Ameritech ISP customers to be local exchange traffic for purposes of interstate separations and ARMIS reports.

17. Ameritech charges Ameritech's ISP customers local business line rates under Ameritech's local exchange service tariff that enable customers of Ameritech's ISP customers to connect to their ISP by making a local call.

18. Under current FCC rules, the FCC treats traffic to ISPs as local traffic.[7] The FCC is currently examining the

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[7] *In the Matter of Charge Reform*, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997), paras. 344-348; *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45 (released May 8, 1997) at 83, 788-789 ("Universal Service Order"); *Implementation of the Non-*

issue of the use of the public switched network by Internet service providers, but has not altered the existing rules.[8]

19. The position asserted by Ameritech has been soundly rejected by at least eight other state regulatory agencies. When US West similarly asserted that traffic originated by or terminated to enhanced service providers should be exempted from reciprocal compensation arrangements under Interconnection Agreements, the states of Arizona,[9] Colorado,[10] Minnesota,[11] Oregon,[12] and Washington[13] all declined

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Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996), para. 120.

[8] Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, F.C.C., CC Docket 96-263 (released Dec. 24, 1996)("NOI Proceeding"); see also In the Matter of Request by ALTS for Clarification for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, F.C.C., CCB/CPD 97-30 (F.C.C.) ("ALTS Proceeding")(decision pending).

[9] Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 et al. (Arizona Corp. Comm. Oct. 29, 1996) at 7.

[10] Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US West Communications, Inc., Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Col. PUC Nov. 5 1996) at 30. The Colorado Public Utilities Commis-

to treat traffic to enhanced service providers, including ISPs, any differently than other local traffic. When New York Telephone unilaterally withheld payment of reciprocal compensation for local exchange traffic delivered to ISPs served by a WorldCom affiliate, MFS Intelenet of New York, Inc. ("MFS-NY"), and MFS-NY in turn filed a complaint with the New York Public Service Commission ("NYPSC"), the

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sion has since affirmed its rejection of US West's efforts to exclude ISP traffic from reciprocal compensation by rejecting such a provision in a proposed US West tariff. The Investigation and Suspension of Tariff Sheets Filed by US West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination Unbundling and Resale of Services, docket No. 96A-331T. Commission Order, at 8(Colo. P.U.C. July 16, 1997).

[11]Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US West Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76.

[12]Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996, Commission Decision, order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13.

[13]Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US West Communications, Inc., Pursuant to 47 USC 252, Arbitrator's Report and Decision , Docket No. UT-960323 (Wash. Utils. And Transp. Comm. Nov. 8, 1996) at 26.

NYPSC ordered New York Telephone to continue to pay reciprocal compensation for such traffic.[14]

20. Following the filing of a similar complaint by another WorldCom affiliate, the Maryland Public Service Commission ruled that local exchange traffic to ISPs is eligible for reciprocal compensation and ordered Bell Atlantic to make such payments.[15]

21. Similarly, in response to a petition filed by Southern New England Telephone, the Connecticut Department of Public Utility Control has held that local exchange traffic to ISPs is local in nature and eligible for reciprocal compensation.[16]

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[14]*Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Denying Petition and Instituting Proceeding (N.Y.P.S.C. July 17, 1997). The Order also instituted a proceeding to consider issues related to Internet access traffic. A copy of the Order is attached as Exhibit E.

[15]Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. A copy of the letter is attached as Exhibit F. Also included in Exhibit F are a September 26, 1997 letter from the Executive Secretary staying the decision to compel Bell Atlantic to make payments pending reconsideration, and an October 1, 1997 letter from the Executive Secretary denying Bell Atlantic's petition for reconsideration and lifting the stay.

[16]Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic, Docket No. 97-05-22, Decision (Conn. D.P.U.C. Sept. 19, 1997). A copy of the Decision is attached as Exhibit G.

22. The conduct of Ameritech poses a threat to competition by compelling WorldCom to incur uncompensated costs. The number of local minutes of use that Ameritech's customers terminate to WorldCom's ISP end users each month is substantial. Ameritech's refusal to provide reciprocal compensation for these calls will cause WorldCom to incur unrecovered termination costs every month, as well as the costs incurred in attempting to secure Ameritech's compliance with the Agreement. The failure of Ameritech to compensate WorldCom for the use of WorldCom's network will necessarily impede competition by requiring WorldCom to allocate WorldCom's resources otherwise intended to develop and expand its market to offset uncompensated costs incurred to transport and terminate traffic originated by Ameritech's customers.

23. As a common carrier, WorldCom cannot refuse to provide serve, therefore, WorldCom has no ability to diminish the termination costs, which are caused solely by the decision of Ameritech's telephone exchange service customers to place calls to WorldCom's telephone exchange serve customers who happen to be ISPs. As a result of WorldCom's duty to interconnect with Ameritech and provide for seamless exchange of telecommunications. WorldCom could not block any of these calls. In turn, WorldCom has suffered and continues to suffer financially as Ameritech fails to provide any compensation for terminating calls to ISP customers served by WorldCom. Ameritech's knowing and unreasonable actions have an adverse effect on the ability of WorldCom to provide service to its customers.

24. The parties thus owe each other reciprocal compensation for any local traffic terminated on the other's network.

25. Section 1.38 of the Agreement defines "Local Traffic" as:

> a call of which the distance is fifteen (15) miles or less as calculated by using the V&H coordinates[17] of the originating NXX and the V&H Coordinates of the terminating NXX, or as otherwise determined by the FCC or the Commission for purposes of Reciprocal Compensation, provided, that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

26. Section 1.48 of the Agreement defines "NXX" as

> the three-digit code which appears as the first three digits of a seven digit telephone number.

27. The reciprocal compensation provision in Section 5.8.1 of the Agreement states:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or MFS which a Telephone Exchange Service Customer originates on Ameritech's or MFS's network for termination on the other Party's network.

28. Section 5.8.2 of the Agreement states:

> The Parties shall compensate each other for such transport and termination of Local Traffic at the rate provided in the Pricing Schedule.

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[17] "V&H coordinates" is not defined in the Agreement, but it is understood to mean "vertical and horizontal coordinates," or geographic location, and the distance between V&H coordinates is measured in airline miles.

29. All calls that terminate at an NXX within 15 airline miles of the originating NXX, regardless of the identity of the end users, are local calls under Section 1.38 of the Agreement, and reciprocal compensation is due for such calls. This includes any and all calls placed by Ameritech's telephone exchange service customers to any and all of WorldCom's telephone exchange service customers, including any who happen to be ISPs.

30. Ameritech has not identified any NXX to which the local call to an ISP terminates that would make it not eligible for reciprocal compensation. There is only one "seven-digit telephone number" called by an end user to an ISP, and that is the local exchange telephone number of the ISP.

31. Ameritech's refusal to provide reciprocal compensation for the ISP calls of its customers that terminate on WorldCom's network constitutes a material and willful breach of the terms of the Agreement.[18]

32. WorldCom respectfully request that the Commission, pursuant to its authority under the PUA and the specific authority granted to state commissions under Section 252 of the Federal Act to enforce the terms of the agreements its approves, immediately issue an order; (1) finding that all telephone calls placed within the same local calling area from an Ameritech-provided telephone exchange serve customer to a WorldCom-provided telephone exchange customer qualify as local traffic; (2) finding that Ameritech has knowingly impeded the development of competition in the

[18]Ameritech's refusal also violates Section 251(b)(5) of the Federal Act, which sets forth the obligation of all LECs to provide reciprocal compensation.

Illinois local exchange market by unilaterally refusing to provide reciprocal compensation for local calls to the ISP end users of WorldCom; (3) finding that Ameritech knowingly and unreasonably is acting or failing to act in a manner that has an adverse effect on the ability of WorldCom to provide service to its customers; and (4) ordering Ameritech to provide WorldCom with reciprocal compensation for such local traffic and to release any such compensation that has been withheld.

Respectfully submitted,

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Counsel for WorldCom Technologies, Inc

Dated: October 9, 1997

C. Complaint filed by MCI Telecommunications Corp.

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MCI Telecommunications Corporation
and MCI Metro Access Services Transmission Inc.,

vs. No. 97-0525

Illinois Bell Telephone Company,
d/b/a Ameritech Illinois

COMPLAINT

MCI Telecommunications Corporation ("MCI"), on behalf of itself and its wholly-owned subsidiary Metro Access Transmission Services, Inc. ("MCImetro")(collectively referred to as "MCI"), by their attorney, hereby files this complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech"), pursuant to the Public Utilities Act ("PUA"), 220 ILCS 5/101 et seq., for violating the terms of its Interconnection Agreement with MCI, approved by the Commission Order issued on April 28, 1997 in Docket No. 97-AA-002, Commission orders and the PUA by refusing to pay reciprocal compensation to MCI for local traffic terminated by MCI to its Internet service provider ("ISP") customers. In support of this complaint, MCI states as follows:

1. MCI is a corporation duly authorized to do business in the State of Illinois, and is subject to the jurisdiction of the

Commission. MCI has its principal Illinois offices at 205 North Michigan Avenue, Chicago, Illinois 60601, telephone number (312) 470-2121.

2. MCI is a telecommunications carrier providing competitive interexchange telecommunications services throughout the State of Illinois, and is authorized to provide interMSA and intraMSA services. See Orders of the Illinois Commerce Commission, Docket No. 83-0670, June 27, 1984, May 14, 1996 and September 30, 1997; see also 220 ILCS 5/13-202, 5/13-203 (1993). MCImetro, a wholly-owned subsidiary of MCI, is authorized to provide switched local exchange services in those areas of Market Service Area-1 ("MSA-1") served by Ameritech. *MCI Metro Access Transmission Services, Inc.* Order., Illinois Commerce Commission Docket No. 94-0400, August 16, 1995.

3. Ameritech, which has offices at 225 West Randolph Street, Chicago, Illinois 60601, is a local exchange carrier authorized by the Commission to provide local exchange services in Illinois pursuant to 220 ILCS 5/13-405.

4. As a local exchange carrier, MCI's facilities are interconnected with the facilities of Ameritech so that customers of MCI can place calls to customers of Ameritech, and vice versa. Pursuant to the requirements of the Telecommunications Act of 1996, MCI has completed its arbitration with Ameritech in Commission Docket No. 96-AB-006. The Commission entered an order approving an interconnection agreement between MCI and Ameritech on April 28, 1997 in Docket No. 97-AA-002.

5. On July 3, 1997, MCI received a letter from Ameritech in which Ameritech Illinois stated that it would not pay to MCI reciprocal compensation for the termination of calls

originated by customers of Ameritech and terminated by MCI to MCI's ISP customers because Ameritech considers such calls to be "non-Local Traffic." A copy of Ameritech Illinois' July 3, 1997 letter is attached to this complaint and designated as Exhibit A.

6. MCI responded to the Ameritech letter on August 13, 1997, demanding that Ameritech pay the reciprocal compensation bill as rendered by MCI. A copy of the MCI letter is attached to this complaint and designated as Exhibit B.

7. Thereafter, on September 12, 1997, MCI sent another letter to Ameritech restating its position that calls to ISPs are local calls subject to reciprocal compensation, and notifying Ameritech that by refusing to compensate MCI for the termination of local traffic delivered by MCI to ISPs is knowingly impeding the development of competition in the local exchange market in Illinois and demanding that Ameritech pay MCI reciprocal compensation for traffic terminated to ISPs. A copy of the September 12, 1997 MCI letter is attached to this complaint and designated as Exhibit C.

8. Traffic from Ameritech Illinois customers to ISPs served by MCImetro is local traffic subject to reciprocal compensation for the following reasons:

1) the ISP purchases local service from MCI and receives NXX-XXXXs for such service at its premise;

2) when an Ameritech customer originates a call by dialing the NXX-XXXX of the ISP, that call, as far as MCI is concerned, "terminates" as the ISP premise assigned to the NXX-XXXX;

3) traffic from the Ameritech customer that terminates to that ISP's NXX-XXXX is local to the Ameritech customer; and

4) Ameritech charges its own customers local charges for the calls they make to the ISPs served MCI.

The development of competition in Illinois will be seriously impeded if carriers such as Ameritech are permitted to refuse payment to competitive carriers for interconnection services.

9. Ameritech's failure to pay MCI reciprocal compensation for ISP local traffic constitutes a violation of the parties' interconnection agreement. Specifically, Scheduled 1.2 of the interconnection agreement between MCI and Ameritech defines "Local Traffic" as:

> a call the distance of which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or or otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation;...

Schedule 1.2 of the agreement also defines "NXX" as "the three-digit code which appears as the first three digits of a seven digit telephone number."

10. The reciprocal compensation provision of the agreement appears in Section 4.7 and states:

> Reciprocal compensation applies for transport and termination of local traffic billable by Ameritech of MCIm that a Telephone Exchange Service Customer originates on Ameritech's or MCIm's network for termination on the other Party's network. The parties shall compensate each other for such transport and termination of Local Traffic at the rates provided at Item II of the Pricing Schedule; provided that when Ameritech terminates Local Traffic to MCIm, Ameritech shall only be required to pay MCIm the rate for End Office Local Termination.

Thus, the interconnection agreement between MCI and Ameritech requires the payment of reciprocal compensation for traffic that originates and terminates within a local calling area (for these purposes, the local call area of Ameritech). Copies of the relevant provisions of the interconnection agreement between MCI and Ameritech are attached as Exhibit D.

WHEREFORE, MCI respectfully request that the Commission, pursuant to its authority under the PUA and the specific authority granted to state commissions under Section 252 of the Telecommunications Act of 1996 to enforce the terms of approved interconnection agreements, promptly issue an order: 1) finding that the term "Local Traffic" as used in its interconnection agreement with Ameritech includes

local calls terminated to ISPs subscribing to local exchange service from MCI; 2) finding that Ameritech has knowingly impeded the development of competition in Illinois by unilaterally refusing to provide reciprocal compensation for local calls to MCI's ISP customers; 3) finding that all such traffic is subject to the payment of local reciprocal compensation to MCI by Ameritech, in the same manner as any other local call from an Ameritech local exchange customer to an MCI local exchange customer; and 4) ordering that Ameritech immediately pay MCI for all ISP traffic delivered to MCI, including traffic delivered prior to the date of this filing, for which Ameritech has refused payment, together with interest on all amounts owed and unpaid.

Respectfully submitted,
MCI Telecommunications Corporation
And MCI Metro Access Transmission Services, Inc.

By:

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Suite 3700
Chicago, IL 60601
(312) 470-4943

Its Attorney

Dated: October 10, 1997

APPENDIX E - ORDER, ILLINOIS COMMERCE COMMISSION, MARCH 11, 1998

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Teleport Communications Group, Inc.
-vs-
Illinois Bell Telephone Company
Ameritech Illinois

Complaint as to dispute over a contract definition. **97-0404**

WorldCom Technologies, Inc.
successor in interest to MFS Intelenet of Illinois, Inc.
-vs-
Illinois Bell Telephone Company d/b/a Ameritech Illinois

Complaint as to Respondent's failure to pay Complainant reciprocal compensation for local calls which originate on Respondent's network and terminate on Complainant's network. **97-0519**

MCI Telecommunications Corporation
and MCIMetro Access Transmission
Services, Inc.,
-vs- **97-0525**
Illinois Bell Telephone Company,

d/b/a **Consolidated**
Ameritech Illinois

Complaint as to Respondent's refusal to pay reciprocal compensation to Complainant for local traffic terminated by Complainant to its Internet service provider customers

ORDER

By the Commission:

I. INTRODUCTION

On September 8, 1997, Teleport Communications Group, Inc. ("TCG") filed a Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech" or "Ameritech Illinois"). In its Complaint, TCG alleged that Ameritech Illinois had violated the terms of its interconnection agreement with TCG as approved by the Commission's order in Docket 96-AA-002. Specifically, TCG complained that Ameritech Illinois had refused to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Information Service Providers ("ISPs") on TCG's network in violation of Section 5.6.1 of its interconnection agreement. TCG requested that the Commission issue an order finding (1) that

the term "Local Traffic" as used in the interconnection agreement with Ameritech Illinois includes local calls terminated to ISPs subscribing to local exchange service from TCG; (2) that all such traffic is subject to reciprocal compensation, in the same manner as all other local calls from an Ameritech Illinois local exchange customer to a TCG local exchange customer; (3) that Ameritech Illinois is obligated to pay TCG for all ISP traffic delivered to it, including traffic delivered before the filing of its Complaint for which Ameritech Illinois has refused payment, together with interest on all amounts owed and unpaid; and (4) that Ameritech Illinois be reprimanded for anticompetitive and unilateral withholding of monies owed to TCG.

On October 9 and 10, WorldCom Technologies, Inc. ("WorldCom") and MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc. (collectively "MCI"), respectively, filed complaints against Ameritech Illinois alleging similar violations of their interconnection agreements and requesting relief similar to that which TCG requested. WorldCom and MCI, respectively, filed motions to consolidate Dockets 97-0404, 97-0519, and 97-0525. On November 4, 1997, the Hearing Examiner, on his own motion, consolidated the three dockets.

Petitions to intervene were filed by AT&T Communications of Illinois, Inc. and Focal Communications Corporation of Illinois ("Focal") in Docket 97-0404. America Online, Inc. and Consolidated Communications, Inc. filed petitions to intervene in all three dockets. All petitions to intervene were granted by the Hearing Examiner.

Pursuant to notice as required by law and the rules of the Commission, a prehearing conference, status hearing and

evidentiary hearing were held before the duly authorized Hearing Examiner in Chicago, Illinois on September 25, 1997, October 9, 1997 and November 21, 1997, respectively. At the evidentiary hearing on November 2, 1997, TCG presented the direct and rebuttal testimony of William Page Montgomery, founder and principal of Montgomery Consulting. WorldCom presented the direct and rebuttal testimony of Alex J. Harris, Vice President of Industry Affairs for WorldCom. MCI presented the direct and rebuttal testimony of Dennis L. Ricca, Senior Regulatory Analyst for Public Policy for the Northern Region of MCI. Staff presented the direct and rebuttal testimonies of M. Al Talbott and Jason P. Hendricks, Chief Telephone Engineer and Economic Analyst, respectively, in the Telecommunications Division of the Commission. Ameritech Illinois presented the direct and rebuttal testimony of Eric L. Panfil, Direct - Local Exchange Competition Issues, and the direct testimony of Suzanne J. Springsteen, a Director of Ameritech Information Industry Services. At the conclusion of the hearing the record was marked "Heard and Taken".

Initial briefs were filed by TCG, WorldCom, MCI, Focal, Staff and Ameritech Illinois. America OnLine, Inc. filed an initial brief in the form of a "position paper" which Ameritech Illinois moved to strike in its Initial Brief. Reply briefs were filed by TCG, WorldCom, MCI, Staff, Ameritech Illinois and Focal Communications. Ameritech Illinois filed a Motion for Leave to Respond to MCI's reply brief and a Response to MCI's reply brief. Draft Orders were also filed on January 16, 1998.

A. Hearing Examiner's Proposed Order was duly served on the parties.

II. POSITIONS OF THE PARTIES

Complainants - Competitive Local Exchange Carriers

TCG, WorldCom and MCI took essentially similar positions on the issues in this proceeding in their testimony. All three carriers (collectively "CLECs") take the position that this proceeding involves a violation of interconnection agreements over which this Commission has jurisdiction. The CLECs state that Ameritech has breached the interconnection agreements by failing to pay reciprocal compensation to the CLECs for local calls originated by end users on Ameritech's network and terminated to Information Service Providers ("ISPs") on the CLECs' networks. The CLECs state that the interconnection agreements clearly require the payment of reciprocal compensation for calls "billable" as local traffic. Because Ameritech bills its customers for calls to ISPs under its local traffic rates, those calls must be subject to the reciprocal compensation provisions of the interconnection agreements.

The CLECs argued that treating calls that terminate to ISPs as local calls is consistent with the manner in which Ameritech Illinois treats this traffic for rating, accounting, and billing purposes. For example, WorldCom witness Harris testified that "when an Ameritech Illinois telephone exchange service customer places a call to an ISP within the caller's local calling area, Ameritech Illinois rates and bills such customer for a local call pursuant to the terms of Ameritech's local tariffs." (WorldCom Ex. 1.0, p. 6). Mr. Harris further stated that Ameritech Illinois treats this traffic and the associated revenue as local for purposes of jurisdictional separations and ARMIS reports. Second, they also argued that a call to an ISP terminates at the ISP before it is connected to the Internet and, therefore, the call is a local call. To support this argument, they contended that, when the call reaches the telephone exchange service purchased by the ISP and to which the called telephone number is assigned, the call is terminated. Third, they further argued that treating calls to ISPs as local calls is consistent with the definition of local traffic contained in the interconnection agreements that they have with Ameritech Illinois. Section 5.8.1 of the WorldCom MFS agreement, for example, provides that:

> "Reciprocal compensation applies for transport and termination of Local Traffic billable by Ameritech Illinois or MFS which a Telephone Exchange Service Customer originates on Ameritech's or MFS' network for termination on the other Party's network."

"Reciprocal Compensation" is defined in Section 1.51:

> "As described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications originating on one Party's network and terminating on the other Party's network."

"Local traffic" is defined in Section 1.38 of the Agreement as:

> "a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the

terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; *provided*, that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated." (WorldCom Ex. 1.0, pp. 12-13).

In addition, the interconnection agreement between TCG and Ameritech defines local traffic as "local service calls as defined by the Commission." TCG Ex. 7 at 5. Based on these sections the CLECs contend that the agreements' reciprocal compensation provisions apply to local traffic terminated to an ISP. Mr. Montgomery further contended that Ameritech Illinois knew early on that the CLECs intended to market to ISPs. Several of the CLECs also contended that Ameritech Illinois simply regretted its prior position supporting reciprocal compensation, rather than "bill and keep". Fourth, the CLECs argued that calls to ISPs are routed to them over local interconnection trunks and, therefore, that this traffic must be local traffic.

Finally, the CLECs noted that other state commissions and the FCC have determined that traffic terminating to an ISP is local, and that this Commission should reach the same conclusion in this proceeding. Mr. Montgomery states that "[u]nder the FCC rules, the ISPs are not carriers subject to the access charge rules." (TCG Ex. 10, p. 12). Mr. Montgomery further contended that what is sometimes referred to as the FCC's "exemption policy" was a misnomer and is not really an exemption policy, because the FCC had not classified the ISPs as IXCs. Mr. Montgomery also claimed that Ameritech had taken contradictory positions in other FCC dockets. Mr. Harris stated that "the FCC unambiguously

characterized the connection from the end user to the ISPs as local traffic." (WorldCom Ex. 1.0, p. 17)

The CLECs further contend that Ameritech Illinois' refusal to pay reciprocal compensation has anticompetitive implications. Mr. Montgomery, for example, argued that Ameritech Illinois was taking this position because it had been "bested" in the market by the CLECs. (TCG Ex. 10.0, p. 19).

AMERITECH ILLINOIS

Ameritech Illinois took the position that ISP calls are not "local" traffic within the meaning of the interconnection agreement and, therefore, are not subject to reciprocal compensation obligations. Ameritech further stated that the issues raised by the CLECs had already been presented to the Federal Communications Commission ("FCC") for resolution, raised questions regarding the interpretation of the FCC's access charge exemption policy and must be decided in the first instance by the FCC.

Ameritech Illinois witness Springsteen testified that she became concerned in April 1997 because CLEC terminating minutes of use subject to reciprocal compensation were significantly higher than Ameritech Illinois'. She initiated a study to determine why the traffic imbalance exists and concluded that it was due to Internet ISP traffic. Ameritech initiated the contract dispute process in July, 1997, that led to this proceeding. She also disputed the CLECs' contentions that Ameritech Illinois knew that ISP traffic caused the imbalance much earlier than that.

Ameritech Illinois witness Panfil first described the FCC's history regarding the proper treatment of ISP traffic. As explained by Mr. Panfil, the current regulatory treatment of ISP

traffic has its origins in decisions which the FCC made in 1993 when it created the carrier access charge regime in response to the pending divestiture of the Bell Operating Companies by AT&T. *MTS and WATS Market Structure*, 97 FCC 2d. 682 (1983) (*111983 FCC* Order"). In 1983, Mr. Panfil stated that there was no question that both IXCs and ISPs used the local exchange networks in precisely the same way to originate and terminate interstate calls. Although the FCC required all IXCs to begin paying access charges, for policy reasons the FCC exempted ISPs from such charges and permitted them to continue paying local exchange rates. 1983 *FCC* Order, § 711. He further explained that the FCC's policy decision stemmed from the fact that the information services industry was in its infancy and reflected a concern that application of access charges at 1983 levels would impose rate shock.

Mr. Panfil asserts that in 1987, the FCC recognized that ISPs were not paying enough to cover the costs of the exchange access facilities they used and proposed to terminate the exemption. *Amendments* of *Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking* FCC Rcd 4305 (1987). After intense lobbying by the ISP industry, however, Mr. Panfil stated that the FCC reluctantly concluded that the time was not yet right to correct the disparity.

Ameritech acknowledged that, in its 1996 access charge reform order, the FCC once again declined to impose carrier access charges on ISPs. In *re Access Charge Reform*, CC Docket Nos. 96-262 et al., 11344-48 (released May 16, 1997). However, at the same time, the FCC instituted a new proceeding to address the implications of information services more broadly, with the intention of developing proposals

that the FCC contended would be "sensitive to the complex economic, technical and legal questions raised in this area." *Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket 96-202 (released Dec. 24, 1996).

Mr. Panfil further explained that the FCC is currently addressing precisely the same issue raised by the CLECs in this case in a proceeding initiated by the ALTS. *In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CCB/CBD 97-30 ("ALTS Docket"). ALTS has requested an expedited FCC ruling that "calls to an Information Service Provider made from within a local calling area must be treated as local calls by any and all LECs involved in carrying those calls." Mr. Panfil stated that Ameritech and all of the Complainants have submitted pleadings in FCC Docket 97-30 which set forth their respective positions. Indeed, Ameritech noted in its Reply Brief that the ALTS request was premised on the FCC's "exclusive jurisdiction". The comment cycle at the FCC is complete, and according to Mr. Panfil, the FCC is expected to issue a ruling within the near future.

Ameritech Illinois also disputed the CLEC's substantive arguments relative to the nature of ISP traffic. First, Mr. Panfil stated that Ameritech Illinois treats calls terminated to ISPs as local calls for billing and rating purposes solely due to the FCC's access charge exemption for ISPs, and that the billing and rating of such calls does not determine whether the call is a local call under state jurisdiction. He further stated that ISP calls are, in fact, interstate calls within the jurisdiction of the FCC. With respect to separations and reporting procedures, Mr. Panfil maintained that these proce-

dures will be reviewed once the FCC has issued its ruling in the ALTS proceeding. He also noted that FGA traffic - which is indisputably access traffic - was also treated initially as local for these purposes.

Mr. Panfil contended that Ameritech Illinois' interconnection agreements with the CLECs do not define ISP calls as local calls. Mr. Panfil argued that, although the FCC has exempted ISPs from paying access charges, it never has considered ISP traffic to be local traffic. In his view, had the FCC concluded that ISP traffic is local traffic, the FCC would not have had the authority to decide whether or not ISPs should be required to pay access charges. Therefore, such calls are exchange access and, therefore, are not subject to the reciprocal compensation provisions in the agreements.

Third, Mr. Panfil argued that, although the call termination definition used by WorldCom witness Mr. Harris is an accurate service definition, it is not an appropriate *jurisdictional* definition. He testified that the information service provided by the Internet ISPs to the end user is always jurisdictionally interstate. He further compared calls terminated to ISPs to Interstate Feature Group A ("FGA") access service, whereby an IXC's toll switch is assigned a standard local telephone number within the caller's local calling area, and the end user is billed for a local call. When the call is connected to the IXC's toll switch, that switch gives the end user a second dial tone, and the end user then dials a long distance call. Mr. Panfil pointed out that, while local charges are assessed for the local portion of the call, and while the FGA *service* provided by the LEC terminates at the IXC's POP, the calls are not jurisdictionally local calls. Rather, they are *jurisdictionally* interstate or intrastate access service. He added that local charges are billed to the end user because there has

been no feasible way to suppress them. Mr. Panfil also maintained that Ameritech Illinois' position in other FCC dockets were not inconsistent with its position in this docket, contrary to Mr. Montgomery's contentions.

Fourth, Mr. Panfil and Ms. Springsteen both stated that the fact that ISP traffic is routed over local interconnection trunks is irrelevant. They noted that interim number portability ("INP") traffic and FGA traffic are also routed over these trunks even though INP traffic and FGA traffic are considered to be exchange access traffic. Finally, Mr. Panfil stated that other state commissions' decisions regarding the nature of ISP traffic are irrelevant to this proceeding, and are wrong in any event.

Mr. Panfil further took the position that application of reciprocal compensation requirements to this traffic would have unwarranted financial results. He pointed out that, because of the FCC's access charge exemption policy, handling ISP traffic is a losing proposition for all LECs. That is because the local rate structure is not compensatory for calls with long holding times, as are typical of Internet calls. Mr. Panfil stated that, if reciprocal compensation for Internet calls is required, what is already a losing proposition for the LEC becomes financially disastrous. In support, he provided data which showed the financial burden imposed on Ameritech Illinois by "typical" Internet traffic, with and without reciprocal compensation obligations. In its Initial Brief, Ameritech Illinois stated that such a result would be contrary to the Commission's policies established in its *Customers First* proceeding for reciprocal compensation, which stated that such arrangements should be equitable to both parties.

Mr. Panfil also denied the CLECs' allegations that Ameritech's position in this case is anticompetitive. Mr. Panfil explained that Ameritech did not object to the CLECs competing for ISP traffic. He explained that Ameritech only objects to "subsidizing" the CLECs' marketing efforts through intercarrier compensation arrangements that require it to pay more to the CLECs than it receives from the end user in the first instance. He further stated that Ameritech's position was not based on the mere fact that it is a net "payor" under these agreements. He stated that Ameritech took the risk that CLECs would target customers with high terminating traffic requirements; however, Ameritech Illinois had not assumed the risk that the CLECs would target ISP traffic which has unusually long holding times and demand reciprocal compensation for traffic which is not local traffic in any event.

In the event that this Commission decides to address the issues on their merits now and concludes that some form of compensation is required, Mr. Panfil proposed an interim solution. This solution would apply until either the FCC resolves this issue or an appropriate economic structure is created that allows all carriers to recover their costs. Under his plan, Ameritech Illinois and the CLECs would develop an estimate of the revenues that they currently receive for Internet ISP traffic. The companies could jointly determine what percentage of the switching and transport facilities used for calls terminated to an ISP belong to each company. The percentage factor could then be used to allocate the revenue pool between the companies. This approach, Mr. Panfil stated, would produce equitable results and would avoid creating a situation where one competitor subsidizes another.

In its Initial Brief, Ameritech Illinois contended that the FCC has preemptive jurisdiction over the issues in this proceeding. Ameritech Illinois argued that the FCC has exclusive jurisdiction over interstate traffic and that the FCC must be permitted to clarify its access charge exemption relative to this traffic. It further contended that the doctrine of primary jurisdiction requires that the Commission defer this proceeding and await the FCC's decision before considering the complaints on their merits. Ameritech Illinois noted that the FCC is uniquely suited to interpret its own prior orders; that the ISP traffic issue is not unique to Illinois and requires a single, uniform resolution applicable to all states; that a deferral of action in this case would avoid the risk of inconsistent results between this Commission and the FCC; and that a premature decision here would adversely affect the FCC's performance of its regulatory responsibilities. Finally, Ameritech Illinois argued that principles of comity, non-interference among decision-making bodies and interests of administrative economy justified deferral of action by this Commission.

STAFF

Staff took the same position as the CLECs, *i.e.*, that calls terminated to an ISP are local calls subject to reciprocal compensation. Staff contended that distinguishing between end user calls terminated to ISPs and those terminated to other end users, for purposes of reciprocal compensation, would violate the terms of the interconnection agreements between Ameritech Illinois and the CLECs. Staff argued that, because the agreements provide that reciprocal compensation is applicable to "Local Traffic billable by Ameritech," and since Ameritech Illinois currently charges its end users local service charges when completing calls that terminate at

the CLECs' ISP customers, withholding reciprocal compensation on those calls would violate the terms of the interconnection agreements.

Staff also took the position that there was no technical basis upon which to distinguish between end user calls terminated to ISPs and those terminated to any other type of end users.

Finally, Staff argued that the FCC does not consider ISP traffic to be exchange access traffic. This is because the current FCC rules classify ISPs as "end users" and not as telecommunications carriers. Further, in its *Access Charge Reform Order*, Staff argued that the FCC had concluded that ISPs should remain classified as end users for purposes of the access charge system. (*Id.* at 1348). In its rebuttal testimony, Staff further contended that ISP traffic is not exchange access service. Staff argued that, when the originating end user makes an FGA call and that call is connected to the IXC's network, the originating end user uses the IXC's network to exchange telecommunications traffic with the end user to which the call is terminated. However, when an originating end user calls an ISP in order to use the Internet, the traffic exchanged after the call is terminated to the ISP is not considered to be telecommunications traffic by the FCC. Instead, it is considered to be an information service. Staff also noted that, although the interconnection agreements between Ameritech Illinois and the CLECs do not explicitly define local traffic to include ISP traffic, these agreements do not define local traffic to exclude ISP traffic.

Staff also contended that Mr. Panfill's FGA analogy was inapt, because FGA is exchange access service. Rejecting Mr. Panfill's distinction between service and jurisdictional

definitions, Staff responded that the FCC treats ISPs and end users, and, therefore, an ISP call is a local call. Staff opined that a change in the FCC's exemption policy was unlikely. Staff agreed, however, that the trunks on which ISP traffic travels do not necessarily impact jurisdiction. Staff also questioned whether the FCC has jurisdiction over ISP traffic at all.

With respect to Ameritech Illinois, interim solution, Staff recommended that it not be adopted because it is not consistent with the interconnection agreements. Staff further suggested that the solution to the financial problem identified by Ameritech would be to raise end user rates, a solution which it stated is outside the scope of this proceeding.

COMPLAINANT'S RESPONSE TO AMERITECH

All three carriers claimed that this was a simple contract dispute that could be resolved within the specific context of the interconnection agreements. TCG further argued that computer-based transactions are different from telephone services and that Mr. Panfil's FGA analysis was incorrect. WorldCom and MCI also contended that FGA was not a good analogy because it has different technical interfaces and/or was otherwise irrelevant. MCI claimed that Ameritech Illinois had not challenged the notion that ISP traffic was local traffic until last summer and that it should have been aware that MCI intended to market to this segment.

WorldCom, TCG and MCI also opposed Ameritech's interim compensation proposal. They argued that it was not consistent with the interconnection agreements. TCG further claimed that Internet traffic would be difficult to track and, therefore, that Ameritech Illinois' interim revenue pooling proposal would be difficult to implement.

COMMISSION ANALYSIS AND CONCLUSION

In the present consolidated cases, Complainants have asked this Commission to enforce certain provisions of the Commission-approved interconnection agreements between Ameritech Illinois and the individual complainants. This Commission's jurisdiction under the Public Utilities Act and Section 252 of the Telecommunications Act of 1996 (the "Act") to interpret and enforce the terms of interconnection agreements is not disputed. *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997).

The language of the interconnection agreements define local traffic, define switched access and define reciprocal compensation. The interconnection agreements of MCI and WorldCom define "Local Traffic" as follows:

> [A] call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the [Federal Communications Commission] or Commission for purposes of Reciprocal Compensation; *provided*, that in no event shall a Local Traffic call be more than fifteen (15) miles as so calculated.

WorldCom Ex. § 1.38; MCI Ex. 3.0, Schedule 1.2, at 8. The interconnection agreement of TCG defines Local Traffic as "local service calls as defined by the Commission" TCG Ex. 7, at 5.

The interconnection agreements provide for reciprocal compensation between Ameritech and the CLECs as follows:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the CLECs] that a Telephone Exchange Service Customer originates on Ameritech's or [the CLECs] network for termination for termination on the other Party's network . . . .

The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. . .

WorldCom Ex. 4, § 5.8.1, 5.8.3; TCG Ex. 7, ¶ 5.6, at 14; MCI Ex. 3, ¶ 4.7, at 16.

The interconnection agreements define Switched Exchange Access Service as follows:

> [T]he offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

WorldCom Ex. 4.1; TCG Ex. 7, at 7; MCI Ex. 3, Sch. 1.2, at 12.

The agreements unambiguously provide that reciprocal compensation is applicable to local traffic billable by Ameritech. Since Ameritech Illinois currently charges end users local service charges when completing calls that terminate at the complainants' ISP customers, the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to

those calls. The interconnection agreements do not distinguish between end user calls terminated to ISPs and those terminated to other end users, nor as Staff noted, is there any technical basis upon which to distinguish between end users.

There is no legal basis for treating ISP traffic differently than the traffic of any other similarly-situated end users for purposes of reciprocal compensation. Nothing in the Act exempts ISP traffic or otherwise incumbent LECs from their reciprocal compensation obligation with respect to local traffic. The Act imposes upon all LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" 47 U.S.C. 251(b)(5). We conclude that Ameritech Illinois, by discontinuing its reciprocal compensation payments thereby violated, and is continuing to violate, its interconnection agreements, and its duty under the Act.

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, FCC rules, and industry practice- including the plain language of the interconnection agreements, fully support our conclusion. Contrary to Ameritech Illinois' contentions, ISP traffic is *not* exchange access. First, we are persuaded by Mr. Harris' explanation of industry practice with respect to call termination. He testified that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned." (WorldCom Ex. 1.0 at 7). He further noted that "call termination" does not mean that the call ends. Rather, the call ends when one party to the call disconnects by hanging up.

Ameritech Illinois' conception that the "jurisdictional" basis for a call is determined by a determination of the ultimate end points of the call (such as the databases and web sites accessed by an internet user) and that therefore, the FCC has exclusive jurisdiction over the issue in this docket reflects not only an outdated conception of the telecommunications network, but from a legal standpoint is belied by the Act and the FCC's own decisions. As Staff cogently explained, when an originating end user makes a Feature Group A call and that call is connected to the interexchange carriers' network, there is no dispute that the originating end user uses the interexchange carrier's network to exchange telecommunications traffic with the end user to which the call is terminated. However, when an originating end user calls an ISP provider in order to use the internet, the traffic exchanged after the call is terminated to an ISP is not considered to be telecommunications traffic by the FCC. Instead it is considered to be an information service and that is true regardless of whether the ISP retransmits information received over such calls to or from further interstate or international destinations.

The FCC has concluded that information services are not telecommunications services, and indeed, the Telecommunications Act draws clear distinctions between "telecommunications", "information service", and "exchange access."

As recently as May of 1997 the FCC indicated that it considers internet access as consisting of more than one element:

> When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a

> telecommunications service and is distinguishable from the Internet service provider's offering.

FCC Joint Board on Universal Service ¶ *789*

Based on these critical distinctions the FCC has determined that ISP traffic is *not* an exchange access service, but rather, ISPs should be treated as "end users."

With respect to Ameritech Illinois' argument that the FCC has exclusive jurisdiction over the question presented here, the FCC has noted that,

> "ISPs do pay for their connections to incumbent LEC networks by purchasing service under state tariffs... To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators."

FCC Access Charge Reform Order at ¶ *346*

If the FCC had concluded that calls to ISPs are interstate in nature and thus that the connections between incumbent LECs and Internet ISPs were interstate in nature, like those between incumbent LECs and IXCs for purposes of interstate calls, it would have concluded that it has the authority to address those compensation issues. Accordingly, contrary to Ameritech Illinois' suggestions, there is no jurisdictional conflict here and this proceeding may be resolved as above, through a straight-forward interpretation of contractual terms which is well within the parameters established by existing federal policy.

Ameritech is obligated by its interconnection agreements to pay reciprocal compensation when its customers call internet service providers served by a competing LEC. Nevertheless, the Commission acknowledges that a significant economic issue is raised when regulation permits two different rate structures to be associated with a single telephone call. The evidence in this case shows the incumbent LEC bills customers a single charge for local calls, while the new LEC terminating the call charges the incumbent LEC on a *minutes of use* basis.

Necessarily then, the incumbent LEC will not fully recover the cost of calls to ISP's which last a long time. In these cases, the incumbent LEC will not recover from end-users as much revenues as it incurs in reciprocal compensation charges paid to the terminating carrier.

The Commission, like the FCC, is aware that Ameritech Illinois may need to change its rate structure to correct the alleged underrecovery of providing local network services for connections to ISPs.

There is no dispute that the FCC is currently considering various issues regarding internet communications. However, the initiation of that proceeding provides an insufficient basis for deferring a decision here. It is possible that the FCC may reverse itself and institute some type of access charge or other compensation regime which would be applicable to carriers, or ISPs or other telecommunications end-users. It is also quite plausible that the FCC may conclude that the current situation, so recently reaffirmed by the FCC, should remain undisturbed. The ultimate conclusion, as well as its timing can only be the subject of speculation. This Commission anticipates that if the FCC institutes a change in policy

which impacts the interconnection agreements or any other aspect of state policy, the parties will bring that matter to the Commission's attention in an appropriate fashion.

Ameritech Illinois' proposed interim solution is unacceptable. As MCI witness Ricca points out, it is little more than an attempt to rewrite the interconnection agreement to institute meet-point billing for a particular subset of calls. Ameritech Illinois had every opportunity to present such a proposal in the arbitrations but did not do so.

Finally, we are compelled to comment on our concerns regarding the event giving rise to this complaint. A number of years ago this Commission approved Ameritech Illinois' proposal to adopt a residential untimed local calling rate as part of a comprehensive restructure of the company's rates. While the Commission is certainly aware that the telecommunications environment has changed significantly since then, and the popularity of the internet may have altered the cost assumptions prevalent at the time, we find that Ameritech Illinois' unilateral action of withholding reciprocal compensation payments is wholly inappropriate. By withholding those payments from its local exchange competitors, surely Ameritech Illinois recognizes that it has done nothing to meaningfully address the alleged underrecovery of costs which, if it exists at all, arises primarily from its own rate structure. For more than a year Ameritech Illinois paid reciprocal compensation treating calls to ISPs as local traffic. Rather than withholding payment, Ameritech Illinois could have, and should have, simply petitioned this Commission for a clarification of its obligations under the interconnection agreement.

Indeed, Ameritech Illinois' unilateral "remedy" is so ill-tailored to its perceived problem that it lends substantial credence to the complainants' allegations that Ameritech Illinois' conduct is intentionally anticompetitive. Ameritech Illinois' local exchange competitors are obligated by law to terminate calls made by Ameritech Illinois' customers, they incur costs in order to do so, and they are entitled to be compensated for the use of their equipment and facilities. Significantly, the competitive local exchange carriers can hardly be considered the cause of any additional unrecovered *network* costs which Ameritech Illinois believes arise from increased internet usage.

Even if the complainants have specifically targeted ISPs in their marketing efforts, that is no more objectionable than if a carrier chooses to target a telemarketing firm, a take-out restaurant or a high usage household. As Focal points out, the market for service to ISPs is a growth market both in terms of new ISP entrants into the market and the growing demand for service from new and existing ISPs. It is therefore a natural target for a new entrant. The record establishes that the complainants, are highly dependent upon reciprocal compensation payments to finance their operations. The evidence suggests that traffic to ISPs can represent in excess of 60% of the new entrants' reciprocal compensation billings to Ameritech Illinois. The withholding of the payments caused and continues to cause complainants serious harm and has resulted in an anticompetitive impact which is contrary to the public interest.

Ameritech Illinois correctly points out that the decisions of other state commissions are not binding, and indeed, we have made an independent evaluation of the evidence presented in this docket. Nevertheless, it is striking that over a

dozen states have considered this issue, and without exception all the state commissions have determined that calls to ISP's should be classified as local calls for the purpose of assessing reciprocal compensation. Such agreement among the states concerning a controversial issue is rare. Notably, Ameritech Illinois makes no attempt to distinguish these decisions on the basis of facts or law but merely asserts that the decisions are "wrong". We think that is unlikely, and we join our counterparts in those states which have held that calls to ISPs are local calls and are subject to reciprocal compensation. The complaint is granted.

The Commission, having considered the entire record herein and being fully advised in the premises hereof, is of the opinion and finds that:

(1) Illinois Bell Telephone Company d/b/a Ameritech Illinois, is an Illinois corporation engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(2) Ameritech Illinois and the complainants herein have entered into interconnection agreements pursuant to the Telecommunications Act of 1996; those interconnection agreements have been duly approved by Order of this Commission;

(3) The Eighth Circuit Court of Appeals in *Iowa Utilities Bd. v. FCC*, 120 F3d 753, 804 (1997) found that state commissions "retain primary authority to enforce the substantive terms of the agreements made pursuant to section 251 and 252"

(4) the Commission has jurisdiction of the parties and the subject matter herein;

(5) the recital of facts and conclusions thereon set forth in the prefatory portion of this order are supported by the evidence of record and are hereby adopted as findings of fact and conclusions of law;

(6) Ameritech Illinois has violated its interconnection agreements with each of the complainants by failing to pay reciprocal compensation for calls which are within 15 miles and for traffic that is billable as local from its customers to Internet Service Providers that are the customers of the complainants;

(7) Ameritech Illinois should be required to pay each of the complainants all charges for reciprocal compensation for calls which are within 15 miles and for traffic that is billable as local from its customers to ISPs that are the customers of the complainants; similarly, each of the competitive local exchange carriers should be required to pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois;

(8) the interpretation of the interconnection agreements made in this order should be effective from the dates of those interconnection agreements; Ameritech Illinois should be required to pay each of the competitive local exchange carriers the amount of money that has been withheld by Ameritech Illinois since it stopped making payments for ISP traffic; such payments shall include interest at the statutory rate for all withheld payments;

(9) any outstanding pleadings or motions not previously disposed of should be disposed of in a manner consistent with the results herein;

(10) the Chief Clerk of the Commission should be directed to maintain all information identified as proprietary and data so designated in this proceeding in a manner which will not permit disclosure, dissemination, revelation or reproduction thereof without further order of the Commission.

IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 15 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois.

IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extent Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.

IT IS FURTHER ORDERED that the Chief Clerk of the Commission shall maintain all information identified as proprietary and data so designated in this proceeding in a manner which will not permit disclosure, dissemination, revelation or reproduction thereof without further Order of the Commission.

IT IS FURTHER ORDERED that any outstanding pleadings or motions which have not previously been disposed of shall be disposed of in a manner consistent with this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill.Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 11th day of March, 1998.

(SIGNED)

DAN MILLER

Chairman

(S E A L)

APPENDIX F - COMPLAINT NO. 98-C-1925, FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, MARCH 27, 1998.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,
Plaintiff,

v.

Case No. 98 C 1925

WORLDCOM TECHNOLOGIES, INC. as successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONS GROUP INC., MCI TELECOMMUNICATIONS CORPORATION and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION

and

DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (In Their Official Capacities and not as Individuals),

COMPLAINT

Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois"), by and through its attorneys, brings this action for declaratory, injunctive and other relief and alleges as follows:

INTRODUCTION

1. Ameritech Illinois brings this action pursuant to § 252(e)(6) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151, et seq.) (the "Act") and 28 U.S.C. § 1331 to challenge determinations made by the Illinois Commerce Commission ("Commission" or "ICC"), acting through the defendant Commissioners, with respect to various obligations of Ameritech Illinois under five interconnection agreements ("Agreements") entered into pursuant to §§ 251 and 252 of the Act. Among other things, the Agreements establish the rates, terms and conditions under which defendants WorldCom Technologies, Inc. as successor in interest to MFS Intelenet of Illinois, Inc. ("MFS"), Teleport Communications Group, Inc., ("TCG Illinois" and "TCG Chicago"), MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. ("MCI"), AT&T Communications of Illinois, Inc. ("AT&T"), and Focal Communications Corporation of Illinois ("Focal") (collectively, the "Carrier Defendants") may interconnect with, obtain access to and use Ameritech Illinois' telephone network, facilities and services to provide local telecommunications services in Illinois. Copies of pertinent portions of the voluminous Agreements are attached hereto as Exhibits A-1 through A-5.

2. Ameritech Illinois seeks review of the Commission's March 11, 1998 Order (the "ICC Order") in ICC Case Nos. 97-0404, 97-0519 and 97-0525 (attached hereto as Exhibit B). The ICC Order wrongfully requires Ameritech Illinois to pay reciprocal compensation to the Carrier Defendants with respect to calls (the "Internet ISP Calls") placed by Ameritech Illinois customers through the Internet via Internet service providers ("ISPs") who, in turn, are customers of the Carrier Defendants. The ISPs provide access to the Internet. The ICC Order requires Ameritech Illinois to (1) pay within five business days of the issuance of the ICC Order previously withheld amounts (plus interest) associated with the Internet ISP Calls; and (2) resume payment of reciprocal compensation with respect to Internet ISP Calls in the future.

JURISDICTION AND VENUE

3. This is a civil action arising under the Act, a law of the United States. This Court has jurisdiction over this action pursuant to 47 U.S.C. § 252(e)(6), 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201 and 2202.

4. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b). Ameritech Illinois and all defendants reside in this District. In addition, a substantial part of the property that is the subject of the Agreements is situated in this District and a substantial part of the events giving rise to this action occurred in this District. This is an "appropriate Federal district court" within the meaning of 47 U.S.C. § 252(e)(6).

PARTIES

5. Plaintiff Ameritech Illinois is a corporation organized under the laws of the State of Illinois, with its principal place

of business in Illinois. Ameritech Illinois is a wholly-owned subsidiary of Ameritech Corporation that, among other things, provides telephone exchange service, exchange access and other telecommunications services within the State of Illinois. Ameritech Illinois is the "incumbent local exchange carrier" ("incumbent LEC"), as that term is defined in § 251(h) of the Act, in its authorized service areas in the State of Illinois.

6. Defendant MCI Telecommunications Corporation is a corporation organized under the laws of the State of Delaware. It provides, through operating subsidiaries, long distance telecommunications service, telephone exchange service, exchange access and other telecommunications services in the State of Illinois. Defendant MCImetro Access Transmission Services, Inc. ("MCImetro"), a subsidiary of MCI Telecommunications Corporation, is a corporation organized under the laws of the State of Delaware. MCImetro is a party to an interconnection agreement with Ameritech Illinois, whereas MCI Telecommunications Corporation was a party to the ICC's arbitration and approval process that yielded that Agreement. "MCI" is used throughout this Complaint to refer to MCI Telecommunications Corporation and/or MCImetro Access Transmission Services, Inc. MCI is a "telecommunications provider" and a "requesting telecommunications carrier" within the meaning of §§ 251(a) and 252(a) of the Act.

7. Defendant Teleport Communications Group, Inc. is a corporation organized under the laws of Delaware. TCG Illinois and TCG Chicago are New York general partnerships and are operating affiliates of Teleport Communications Group, Inc. "TCG" is used throughout this Complaint to refer to Teleport Communications Group, Inc., TCG Illinois

and/or TCG Chicago. TCG provides, among other things, telephone exchange service, exchange access and other telecommunications services in the State of Illinois. TCG is a "telecommunications provider" and a "requesting telecommunications carrier" within the meaning of §§ 251(a) and 252(a) of the Act.

8. Defendant WorldCom Technologies, Inc. is a corporation organized under the laws of Georgia. It is a successor in interest to MFS Intelenet of Illinois, Inc. ("MFS"). MFS is a corporation organized under the laws of the State of Delaware. It provides, among other things, telephone exchange service, exchange access and other telecommunications services in the State of Illinois. "MFS" is used throughout this Complaint to refer to WorldCom Technologies, Inc. and/or MFS Intelenet of Illinois, Inc. MFS is a "telecommunications provider" and a "requesting telecommunications carrier" within the meaning of §§ 251(a) and 252(a) of the Act.

9. AT&T Communications of Illinois, Inc. ("AT&T") is a corporation organized under the laws of the State of Illinois. AT&T is a wholly-owned subsidiary of AT&T Corp., which, through its operating subsidiaries, provides long distance telecommunications service, telephone exchange service, exchange access and other telecommunications services in the State of Illinois. AT&T is a "telecommunications provider" and a "requesting telecommunications carrier" within the meaning of §§ 251(a) and 252(a) of the Act.

10. Focal Communications Corporation of Illinois ("Focal") is a corporation organized under the laws of the State of Delaware. It provides, among other things, telephone exchange service, exchange access and other telecommunica-

tions services in the State of Illinois. Focal is a "telecommunications provider" and a "requesting telecommunications carrier" within the meaning of §§ 251(a) and 252(a) of the Act.

11. The Commission is a "State commission" within the meaning of §§ 251 and 252 of the Act.

12 Defendants Dan Miller, Richard Kolhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen are Commissioners of the ICC. They are named as Defendants in their official capacities, and not as individuals.

BACKGROUND

The Telecommunications Act of 1996

13. The federal Telecommunications Act of 1996 (47 U.S.C. § 151 et seq.) was the culmination of efforts over several years by legislators and telephone companies, including Ameritech Illinois, to open up, on a nationwide basis, the market for all types of telephone service, including local exchange service, exchange access and long distance, to full, fair, and effective competition. Sections 251 and 252 of the Act establish, among other things, the requirements and process by which competing local exchange carriers ("competing LECs") may interconnect with and gain access to the networks, facilities and services of incumbent LECs, such as Ameritech Illinois, in order to provide competitive local exchange service and exchange access. Sections 251 and 252 also impose certain obligations on the competing LECs.

14. Section 252 of the Act sets forth the procedure by which a competing LEC may arrive at an agreement with an incumbent LEC for the performance of the duties established

in § 251. To begin the process, the competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. (47 U.S.C. § 252(a)(1).) The parties may arrive at an agreement through negotiations alone. (Id.) Alternatively either party to the negotiation may petition the State utility commission to arbitrate any "open issues" regarding the interconnection agreement. (47 U.S.C § 252(b)(1).) The State commission then arbitrates and rules on the open issues. (47 U.S.C. § 252(b)(4)(C).)

15. The parties submit to the State commission for approval any agreement they arrive at, whether through arbitration or negotiation. (47 U.S.C. § 252(e)(1).) The State commission then approves or rejects the agreement, in accordance with standards set forth in the Act. (47 U.S.C. § 252(e)(2).) After the State commission approves or rejects the agreement, § 252(e)(6) provides for federal court review of the State commission's determinations. Similarly, the State commission is empowered to enforce the agreements it approves, again subject to federal court review. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791 (1997), cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd., 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826).

The Agreements and Their Reciprocal Compensation Provisions

16. In 1996, Ameritech Illinois entered into negotiations for separate interconnection agreements with each of the Carrier Defendants. In each instance, an agreement was reached, either through negotiation or arbitration. These Agreements between Ameritech Illinois and MFS, TCG, AT&T, Focal, and MCI were approved by the ICC, respec-

tively, on July 30, 1996 and August 7, 1996 (MFS); January 8, 1997 (TCG); January 8, 1997 (AT&T); February 20, 1997 (Focal); and April 28, 1997 (MCI).

17. Section 251(b)(5) of the Act provides that all local exchange carriers ("LECs") have the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." If a customer of LEC X makes a local call to a customer of LEC Y in the same service area, LEC X hands off the call to LEC Y at a point where the two carriers' networks are interconnected, and LEC Y then "transports" the call from that point to the switch that serves its customer, which then switches the call to that customer's local loop, on which the call is "terminated" to the customer. The calling party pays LEC X for the call, and LEC X pays "reciprocal compensation" to LEC Y for transporting and terminating the call to its customer.

18. Reciprocal compensation applies only to "local telecommunications traffic," which is traffic that originates and terminates within a local service area established by the state commission. The Federal Communications Commission ("FCC") confirmed this in a regulation it promulgated to implement the requirements of the Act. 47 C.F.R. § 51.701(a), (b)(1).

19. Accordingly, all of the Agreements provide that only "Local Traffic" which terminates on the "other Party's network" is eligible for reciprocal compensation:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Defendant's] network for termination on the other Party's network.

(MFS agreement, § 5.8.1; TCG Agreement, § 5.6.1; MCI Agreement, § 4.7.1; AT&T Agreement, § 4.7.1; Focal Agreement, § 5.8.1).

20. The Agreements define "Local Traffic" as "a call of which the distance is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise determined by the FCC or the Commission for purposes of Reciprocal Compensation" (MFS agreement, § 1.38; MCI Agreement, sch. 1.2; AT&T Agreement, sch. 1.2; Focal Agreement, § 1.46) or as "local service area calls as defined by the Commission" (TCG Agreement, § 1.43).

21. Customers of a LEC make use of the same local network facilities when they make other, non-local types of calls, including regular long distance calls, calls to 800 numbers, so-called Feature Group A calls, and the Internet ISP Calls. Taking regular long distance calls as an example, long distance carriers typically do not have their own local facilities. When a long distance call is made, the calling party's LEC transports the call across its network to a point of interconnection with the long distance carrier; the long distance carrier transports the call across its network to a point of interconnection with the LEC that serves the called party; and the call is completed over the second LEC's network. The service provided by the two LECs delivering traffic from the calling party to the long distance carrier (origination) and from the long distance carrier to the called party (termination) is called "exchange access," and the long distance

carrier pays "access charges" to the originating LEC and the terminating LEC.

22. The Agreements are identical in emphasizing that "Exchange Access" traffic is not eligible for reciprocal compensation:

> The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

(MFS Agreement, § 5.8.3; TCG Agreement, § 5.6.2; MCI Agreement, § 4.7.2; AT&T Agreement, § 4.7.2; Focal Agreement, § 5.8.2.)

23. The Agreements define "switched exchange access service" as:

> [T]he offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services.

(TCG Agreement, § 1.65; MFS Agreement, § 1.56; MCI Agreement, sch. 1.2.; AT&T Agreement, sch. 1.2; Focal Agreement, § 1.66.)

The Nature of the Internet ISP Calls

24. An "Internet service provider" (or "ISP") is an entity that provides its customers the ability to obtain on-line information through the Internet by communicating with "web sites" or termination points located on the Internet, each of which has its own unique address and physical location. The ISP connects to the public switched telephone network in order to offer its Internet communications service to end users.

25. When an ISP is providing the service described in the preceding paragraph, the ISP is not itself an end user of the network, but is an interstate service provider, offering its service to end users. Unlike local calls to residential and business subscribers, a call from an end user through an ISP does not terminate at the ISP. Rather, the ISP is an intermediary in the provision of an interexchange, end-to-end communication. The ongoing transmission of communications transported via the ISP is typically routed from the ISP's local point of presence to distant data centers or Internet localities beyond state and federal boundaries. The ISP thus acts as an intermediary for the provisioning of data-type intrastate, interstate and international communications.

26. In addition to the intrastate, interstate, and international transmission of data, software is available that permits two-way voice calls over the Internet, and therefore end-users making voice calls may bypass toll and access charges when communicating via an ISP. This use of the Internet for interstate voice communications, via ISPs, is increasing. The ISP end user may make a voice or data call to virtually anywhere in the world.

The Internet ISP Calls Are Not Local Calls

27. Whether telecommunications traffic is local or not is defined by the points of origin and termination of the communication. As noted above, the Agreements provide that a call is not "local" unless it originates and terminates within a local service or calling area. Further, section 251 of the 1996 Act, as interpreted by the FCC, defines local traffic as traffic that "originates and terminates within a local service area ..."

28. Unlike "local traffic" as defined by the Agreements and by the Act, the Internet ISP Calls do not originate and terminate within a "local calling area" or within a "local service area." The Internet ISP Calls originate with an end user and terminate at the Internet databases, information sources or other destinations made available by the ISP. Because these destinations are almost always outside the local service area (and indeed are generally located outside the State of Illinois), the Internet ISP Calls are not local and therefore not subject to reciprocal compensation.

The Internet ISP Calls Are Exchange Access Calls

29. As set forth above, the Agreements define "Switched Exchange Access Services" as including "Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services."

30. The Internet ISP Calls are Switched Exchange Access Services under the Agreements because they are "similar" to some or all of the services expressly enumerated. As with the enumerated services, the calling party's call is transported across the local network to a point of interconnection

with the ISP, and the ISP, in turn, transports the call to its ultimate interstate or international destination. In other words, the calling party uses the local network to obtain "access" to distant locations, via a service provider that has a point of interconnection with the local network. As with other exchange access services, the ISP acts as an intermediary in the provision of an interexchange, end-to-end communication.

The FCC Has Concluded That The Internet ISP Calls Are "Exchange Access," Not "Local"

31. On several occasions, the FCC has considered whether the Internet ISP Calls are "local." The FCC has never classified the Internet ISP Calls as local traffic. Instead, the FCC has recognized that this traffic is "exchange access" traffic.

32. The FCC's classification of the Internet ISP Calls as "exchange access" traffic dates back to the inception of the access charge regime in 1983. At that time, the FCC initially held that ISPs would be subject to access charges. On reconsideration, however, the FCC granted the ISPs an exemption from such charges, due to the high costs of exchange access at the time, and the FCC's desire to protect the fledgling information services industry from rate shock. MTS and WATS Market Structure, 97 FCC 2d. 682, 711 (1983).

33. If the FCC had ever considered the Internet ISP Calls to be "local," it would not have exempted such calls from access charges, because interstate access charges could not have lawfully been imposed in the first place.

The Current FCC Proceedings

34. On June 20, 1997, the Association for Local Telecommunications Services ("ALTS") initiated FCC Docket CCB/CBD 97-30 (the "FCC Docket"). Exhibit C. ALTS requested an expedited FCC ruling that the Internet ISP Calls be treated as local calls, rather than exchange access calls, by any and all LECs involved in carrying those calls.

35. ALTS specifically acknowledged that its request "is plainly within the [FCC's] exclusive jurisdiction." Id. It notified the FCC that complaints regarding the Internet ISP Calls had been filed in Connecticut and New York, and urged the FCC to act "promptly to preclude the jurisdictional confusion that inconsistent state actions could produce." Id.

36. On information and belief, defendants Focal, MFS and MCI are members of ALTS.

37. Pursuant to FCC procedures, Ameritech Illinois and the Carrier Defendants have filed Comments and/or Reply Comments in the FCC Docket. The comment cycle at the FCC is now complete.

The Underlying ICC Proceedings

38. After the comment cycle in the FCC was complete, three of the carriers who are now defendants in this action filed individual complaints against Ameritech Illinois before the ICC seeking to obtain money that they alleged was due them as "reciprocal compensation" for the Internet ISP Calls. A Hearing Examiner consolidated the three separate complaints into one proceeding, and subsequently granted AT&T and Focal leave to intervene in the consolidated proceeding.

39. The ICC held hearings and received testimony pertaining to the Internet ISP Calls on September 25, 1997, October 9, 1997, and November 21, 1997. On March 11, 1998, the ICC issued the ICC Order, in which it erroneously concluded that the Agreements require Ameritech Illinois to pay the Carrier Defendants reciprocal compensation for the Internet ISP Calls. The ICC Order requires that Ameritech Illinois (1) pay the amounts, plus interest, associated with the Internet ISP Calls; and (2) resume payment of reciprocal compensation with respect to Internet ISP Calls in the future. The ICC's Order is erroneous as a matter of law, contrary to the express terms of the Agreements and to the controlling orders of the FCC, and in violation of federal law.

COUNT I

The Commission's Interpretation Of The Agreements Is Erroneous As A Matter of Law

40. Ameritech Illinois realleges and incorporates Paragraph 1 through 39 as if fully set forth herein.

41. As noted above, the Agreements define Switched Exchange Access Service to "include . . . Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services."

42. The Internet ISP Calls are a "Switched Exchange Access Service" as defined by the Agreements, because they are "similar" to one or more of the enumerated services. As with the enumerated services, the calling party's call is transported across the local network to a point of interconnection with the ISP, and the ISP, in turn, transports the call

to its ultimate interstate or international destination. In other words, the calling party uses the local network to obtain "access" to distant locations, via a service provider (in this instance, an ISP) that has a point of interconnection with the local network.

43. Notwithstanding the Agreements' inclusion of "similar Switched Exchange Services" -- in addition to those services listed by name -- the ICC disregarded that language and ruled, as a matter of law, that the Internet ISP Calls did not constitute exchange access traffic.

44. The ICC's Order is contrary to the express and unambiguous terms of the Agreements. The ICC's Order is erroneous as a matter of law.

45. Ameritech Illinois is entitled to a declaration that the ICC's Order is invalid and to an injunction against enforcement of the Order.

COUNT II

The ICC Order Is Contrary To Controlling FCC Orders

46. Ameritech Illinois realleges and incorporates Paragraphs 1 through 45 as if fully set forth herein.

47. The FCC has determined that the Internet ISP Calls constitute exchange access traffic rather than local traffic.

48. As a matter of law, the term "Switched Exchange Access Services," among other terms in the Agreements, is a term of art that incorporates applicable federal statutory definitions and the FCC's rulings as to the types of traffic that constitute "exchange access."

49. Despite the FCC's rulings that the Internet ISP Calls are exchange access traffic, the ICC Order holds that the Internet ISP Calls are not exchange access traffic, but local traffic.

50. The ICC's Order is contrary to governing federal law, and its interpretation of the Agreements, which incorporate governing federal law, is erroneous as a matter of law.

51. Ameritech Illinois is entitled to a declaration that the Order is invalid and to an injunction against enforcement of the Order.

COUNT III

The ICC's Order Violates Controlling Federal Law, Which Assigns Authority Over Interstate Communications To The FCC

52. Ameritech Illinois realleges Paragraphs 1 through 51 as if fully set forth herein.

53. The Communications Act of 1934 creates two distinct spheres of regulation. It reserves to the States exclusive jurisdiction over intrastate communications, and it assigns to the FCC authority over, and responsibility for, interstate communications.

54. In virtually all instances, the Internet ISP Calls are not intrastate communications, but rather are interstate communications.

55. The ICC violated federal law, and the principle of jurisdictional separation, by requiring Ameritech Illinois to pay reciprocal compensation with respect to the Internet ISP Calls.

56. Ameritech Illinois is entitled to a declaration that the Order is invalid and to an injunction against enforcement of the Order.

COUNT IV

The ICC Order Violates Sections 251(b)(5), 252(d)(2) and 251(g) of the 1996 Act

57. Ameritech Illinois realleges and incorporates Paragraph 1 through 56 as if fully set forth herein.

58. The ICC's Order requires Ameritech Illinois to pay reciprocal compensation on the Internet ISP Calls. However, the ICC does not have the power, under the 1996 Act, to grant such reciprocal compensation.

59. The controlling federal law which establishes the scope of an incumbent LEC's obligation to pay reciprocal compensation pursuant to interconnection agreements entered into under the Act does not permit the ICC to require Ameritech Illinois to pay reciprocal compensation for Internet ISP Calls. Specifically, Sections 251(b)(5) and 252(d)2 of the Act limit Ameritech Illinois' obligation to pay reciprocal compensation under such interconnection agreements to local calls that terminate on the other local carriers' network. Internet ISP Calls are not local calls under the Act.

60. In addition, Section 251(g) of the 1996 Act provides in pertinent part:

> (g) Continued enforcement of exchange access and interconnection requirements --- On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission. (Emphasis added.)

61. Under § 251(g), each local exchange carrier must, as of today, provide exchange access, information access, and exchange services for such access to ISPs in accordance with the same restrictions and obligations, including receipt of compensation, that applied to that carrier on February 7, 1996 (the date immediately preceding the date of enactment of the 1996 Act).

62. As of February 7, 1996, no court order, consent decree, or regulation, order, or policy of the FCC provided for the payment of reciprocal compensation in connection with the provision of the enumerated services. Therefore, reciprocal compensation does not now apply to the provision of exchange access, information access, or exchange services for such access to ISPs. Reciprocal compensation would apply in the future if and only if the FCC were to expressly so require.

COUNT V

The ICC Order Must Also Be Set Aside Under Illinois Law.

63. Ameritech Illinois realleges and incorporates Paragraph 1 through 62 as if fully set forth herein.

64. Under Illinois law, a party aggrieved by a determination of the ICC may obtain judicial review of that determination. The reviewing court may set aside the ICC's determination if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) Not supported by substantial evidence based on the entire record of evidence presented to or before the ICC.

(b) Without the jurisdiction of the ICC.

(c) In violation of the State or federal constitution or laws.

(d) Made upon proceedings or manner in violation of the State or federal constitution or laws, to the prejudice of the appellant.

65. This Court may exercise supplemental jurisdiction over Ameritech Illinois's state-law claim for judicial review of the ICC determination, because it forms part of the same case or controversy as the federal claims set forth herein.

66. For all of the reasons set forth in the paragraphs and Counts above, the ICC Order is not supported by substantial evidence based on the entire record; without the ICC's jurisdiction; in violation of State and/or federal laws; and made

upon proceedings or manner in violation of State and/or federal laws, to the prejudice of Ameritech Illinois.

PRAYER FOR RELIEF

For the foregoing reasons, Ameritech Illinois respectfully requests this Court to:

1) Declare that the term "Local Traffic" as used in the Agreements does not include the Internet ISP Calls;

2) Declare that the Internet ISP Calls are not subject to the payment of reciprocal compensation;

3) Issue an injunction against enforcement of the ICC's Order; and

4) Award any other relief that this Court deems just and proper.

Respectfully submitted,

ILLINOIS BELL TELEPHONE
COMPANY d/b/a AMERITECH ILLINOIS

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APPENDIX G - OPINION OF THE DISTRICT COURT, JULY 21, 1998.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Illinois Bell Telephone Company d/b/a Ameritech Illinois,
Plaintiff,

v.

WorldCom Technologies, Inc. as a successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group Inc., MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation

and

Dan Miller, Richard Kolhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),

Defendants.

No. 98 C 1925.

[July 21, 1998]

Judge David H. Coar

MEMORANDUM OPINION AND ORDER

Plaintiff Illinois Bell Telephone Co. d/b/a/ Ameritech Illinois ("Ameritech") has filed the instant suit challenging the Illinois Commerce Commission's ("ICC" or "the Commission") determination that Internet calls are "local traffic" as defined by Interconnection Agreements between Ameritech and several of the defendants, and therefore subject to reciprocal compensation. Ameritech contends that the ICC's decision violates the Telecommunications Act of 1996. A hearing on the merits of the case was held by this court on June 25, 1998. As set forth in this Memorandum Opinion and Order, this court upholds the ICC's decision.

I. PROCEDURAL HISTORY

In 1996, plaintiff Ameritech entered into negotiations for separate Interconnection Agreements with five of the defendants in this case, Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. ("MCI"), AT&T Communications of Illinois, Inc. ("AT&T"), and Focal Communications Corporation ("Focal") (collectively the "Carrier defendants"). (Compl. ¶ 16.) In 1996 and 1997 each of the Agreements was approved by the Illinois Commerce Commission ("ICC" or "the Commission"). On September 8, 1997, one of the Carrier defendants, TCG, filed a complaint against Ameritech alleging that Ameritech had violated the terms of its Interconnection Agreement by refusing to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Internet Service Providers ("ISPs") on TCG's network. (Order at 2.) On October 9 and 10, 1997, WorldCom and MCI

filed similar complaints against Ameritech, and the three cases were consolidated on November 4, 1997. (Order at 2.) Subsequently, petitions to intervene were granted as to Focal, AT&T, and others. (Order at 2.)

On March 11, 1998, the ICC entered an Order incorporating factual findings regarding the Carrier defendants' complaints and concluding that Ameritech had violated its Interconnection Agreements. On March 27, 1998, Ameritech filed the instant suit against the Carrier defendants and the Commissioner of the Illinois Commerce Commission ("the Commissioners") seeking review in federal court of the ICC's March 11 Order pursuant to Section 252(e)(6) of the Telecommunications Act of 1996 and 28 U.S.C. § 1331. Ameritech's five-count complaint alleges that the ICC's order is contrary to governing federal law.[1] As relief, Ameritech requests this court to declare that the term "local traffic" as used in the Agreements does not include Internet ISP calls, declare that the ISP calls are not subject to the payment

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[1] Count I alleges that the Commission's interpretation of the Agreements is erroneous as a matter of law because, pursuant to the Agreement, the Internet ISP calls are switched exchange access service. (Compl. 40-45.) Count II alleges that the ICC order is contrary to controlling FCC orders which hold that Internet ISP calls are exchange access traffic. (Compl. 46-51.) Count III alleges that the ICC's order violates controlling federal law which assigns authority over interstate communications to the FCC. (Compl. 52-56.) Count IV alleges that the ICC order violates sections 251(b)(5), 252(d)(2), and 251(g) of the 1996 Act. (Compl. 57-62.) Finally, Count V alleges that the ICC order must be set aside under Illinois law. (Compl. 63-4.) Not all of the counts alleged in the complaint were presented to this court in the final briefing on the merits.

of reciprocal compensation, and issue an injunction against the enforcement of the ICC's order.

Ameritech also filed a motion for stay of the ICC's order pending review. On May 1, 1998, this court issued a stay of the Order pending expedited review of the case on the merits. The defendant Commissioners have filed two motions to dismiss the plaintiff's complaint. Due to the expedited nature of this proceeding, the Commissioners' motions are not yet fully briefed, and will therefore be reviewed in a subsequent decision of this court. At this court's suggestion, the instant Opinion and Order are without prejudice to the Commissioners' positions raised in the motions to dismiss.

II. BACKGROUND

A. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Act" or "Telecommunications Act"), is intended to foster competition in local telephone service. The Act, which amends the Communications Act of 1934, works to open "all telecommunications markets through a pro-competitive, deregulatory national policy framework." *In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, CC Dockets 96-262 et al., Third Report and Order, 11 F.C.C. Rcd. 21354, ¶ 2 (Dec. 24, 1996) (hereinafter "Third Report and Order"). *See generally MCI Telecommunications Corp. v. BellSouth Telecommunications*, Nos. 97 C 2225, 97 C 4096, 97 C 0886, 97 C 8285, 1998 WL 146678, at *1-2 (N.D. Ill. March 31, 1998); *GTE South, Inc. v. Morrison, Jr.*, 957 F. Supp. 800, 801-02 (E.D. Va. 1997). The Act preempts state and local barriers to market entry and requires new entrants into local telecommunication markets to be provided with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251(c)(2)(D) (1998).

Under Sections 251 and 252 of the Act, incumbent Local Exchange Carriers ("LECs") and telecommunication carriers have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated by the Act. *See id.* §§ 251(c), 252. Section 252 provides that parties may enter into agreements either voluntarily or through arbitration with a state public utility commission. If the parties are unable to reach an agreement voluntarily, either party may petition the state public utility commission for arbitration. *See id.* § 252(b)(1). A final interconnection agreement, whether negotiated or arbitrated, is reviewed by the state commission in order to determine whether it complies with the Act. *See id.* § 252(e)(1).

The Act further provides that any party that is "aggrieved" has the right to bring an action in federal court to challenge the terms of the interconnection agreement: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 250, of this title and this section." *Id.* § 252(e)(6). Courts have found that review by the federal courts under Section 252(e)(6) of the Act extends to "the various decisions made by [state commissions] throughout the arbitration period which later became part of the agreement . . ." *GTE South*, 957 F. Supp. at 804.

B. STANDARD OF REVIEW

The Telecommunications Act does not explicitly state the standard that federal district courts should apply when reviewing the decision of a state commission. The Supreme Court has held that in situations "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no *de novo* proceeding may be held." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715, 83 S. Ct. 1409, 1413 (1963) (citations omitted). Accordingly, review in the instant case is limited to the administrative record. *See, e.g., U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, Slip Op. at 3 (W.D.Wash. Jan.7, 1998).

Courts that have examined the standard to be applied in appeals from state commissions have found that the language of Section 252(e)(6) clearly limits a court's jurisdiction to determining whether the agreement meets the requirements of federal law, in particular, the Telecommunications Act. *See, e.g., Southwestern Bell Tel. Co. v. Public Util. Comm'n*, No. 98 CA 043, Slip Op. at 9 (W.D. Tex. June 16, 1998) (*citing GTE Northwest, Inc. v. Hamilton*, 971 F. Supp. 1350, 1354 (D. Or. 1997)). District courts reviewing decisions of state commissions agree that the commissions' interpretations of federal law are reviewed *de novo*, while all other issues, including factual findings, are reviewed with substantial deference. *See, e.g., Southwestern Bell*, No. 98 CA 043 at 10-11; *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, No. C 97-222WD (W.D.Wash. Jan. 7, 1998); *GTE South*, 957 F. Supp. at 804; *U.S. West Communications, Inc., v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997); *AT&T Communications of California, Inc. v. Pacific Bell*, No. C

97-0080, 1998 WL 246652, at *3 (N.D. Cal. May 11, 1998). Courts have reasoned that such a standard furthers the goals of the Telecommunications Act because state commissions have "little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency." *Hix*, 986 F. Supp. at 17.

This court agrees with the reasoning of the above-cited district courts regarding the standard of review for actions brought under the Telecommunications Act. In this two-tiered system of review, the court must first address whether the state commission's action in reviewing the interconnection agreements was procedurally and substantively in compliance with the Act and its regulations. *See Southwestern Bell*, No. 98 CA 043 at 10. If the court finds that the decision is consistent with federal law, the court must next determine whether the decision was arbitrary, capricious, or not supported by substantial evidence. *Id.* at 10-11. "Generally, an agency decision will be considered arbitrary and capricious if the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Hix*, 986 F. Supp. at 18 (*citing Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997)).

III. ANALYSIS

The case at bar is an issue of first impression for this court. Although one other district court, *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, No. 98 CA 043, Slip Op. at 14-25 (W.D. Tex. June 16, 1998) (holding that calls to an

ISP are "local traffic" and therefore eligible for reciprocal compensation),[2] and state commissions in 19 states, (Carrier Def.'s Ex. 6), have determined that LECs must provide reciprocal compensation for calls to the Internet, no federal court in the Seventh Circuit has yet to answer this question.

This case involves the arcane regulatory and contractual question of the appropriate compensation for LECs that terminate Internet traffic. Ameritech argues that such calls are properly classified as "interstate"[3] exchange access calls and therefore no reciprocal compensation should apply. The Carrier defendants and the Commissioners argue that such calls are "local" and therefore require reciprocal compensation under the terms of the Interconnection Agreements. Some review of relevant terminology and technology is useful for understanding the issue at bar, in particular, the billing pro-

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[2] Another federal district court found, in reviewing an agreement approved by the Washington Utilities and Transportation Commission, that the state commission had not acted arbitrarily or capriciously in "deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fee." *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, Slip Op. at 8 (W.D. Wash. Jan. 6, 1998) ("ESPs" refers to "Enhanced Service Providers," which include Internet Service Providers.).

[3] The Federal Communications Commission has determined that interstate telecommunications occur "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia." *In re Federal-State Joint Board on Universal Service*, FCC 98-67, Report to Congress, CC Docket No. 96-45, 112 (April 10, 1998).

cedures for local and long distance calls, as well as the growing phenomenon of the Internet and Internet Service Providers.

A. RECIPROCAL COMPENSATION

Section 251(b)(5) of the Telecommunications Act provides that all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The corresponding regulations define "reciprocal" compensation as an "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e) (1998). The reciprocal compensation system functions in the following manner: a local caller pays charges to her LEC which originates the call. In turn, the originating carrier must compensate the terminating LEC for completing the call. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dockets 96-98 et al., First Report and Order, 11 F.C.C. Rcd. 15499, ¶ 1034 (Aug. 8, 1996) (hereinafter "*First Report and Order*").

Reciprocal compensation applies only to "local telecommunications traffic." 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that "originates and terminates within a local service area established by the state commission." *Id.* § 51.701(b)(1). Ameritech argues that Internet calls are not properly classified as "local" calls under the Interconnection Agreements at issue. Therefore, according to Ameritech, payment of reciprocal compensation is improper.

B. ACCESS CHARGES

"Access charges" are the fees that long distance carriers, known as interexchange carriers ("IXCs"), pay to LECs for connecting the end user to the long distance carrier. "Access charges were developed to address a situation in which three carriers--typically, the originating LEC, the IXC, and the terminating LEC--collaborate to complete a long-distance call." *First Report and Order* ¶ 1034. Typically, the long-distance carrier will pay both the terminating and originating LEC an access charge. The service provided by the LECs is known as "exchange access." The 1996 Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16) (1998).[4]

C. THE INTERNET

"The Internet is an international network of interconnected computers . . . . [which] enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication." *Reno v. American Civil Liberties Union*,--- U.S. ---, ---, 117 S. Ct. 2329, 2334 (1997) (footnote and internal citation omitted). The Internet functions by splitting up information into small chunks or "packets" that "are individually routed through the most efficient path to their destination . . ." *In re Federal-State Joint Board on Universal Service*, FCC 98-67, Report to Congress, CC Docket No. 96-45 (April 10, 1998) at ¶ 64 (hereinafter "*Universal Service Report*"). Despite the growing importance of the Internet in worldwide communications, "[t]he major components of the [Telecommunications Act] have nothing to do with the Internet." *Reno*, --- U.S. at ----, 117 S. Ct. at 2338.

[4] "Telephone toll service" is defined by the act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48) (1998).

D. INTERNET SERVICE PROVIDERS

An Internet Service Provider ("ISP") is an entity that provides its customers the ability to obtain on-line information through the Internet by communicating with web sites. ISPs function by combining "computer processing information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." *Universal Service Report* ¶ 63. If an ISP is in a local calling area, the ISP customer dials a seven-digit number to access the ISP facility and is generally charged a flat fee for the ISP usage, in addition to the corresponding local fee rate for the call to the ISP.[5] Among the services offered to many sub-

[5] Typically, when an individual calls the Internet the call is routed to a "dial-in site," "a small physical location (a phone closet for instance) that contains the electronic equipment needed to accept modem calls and connect them to" the Internet. Haran Craig Rashes, *The Impact of the Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 Temp. Envtl. L. & Tech. J. 49, 69 (1997) (internal citations and footnote omitted.) "Each Internet Service Provider may place anywhere from one or two to thousands of incoming lines and modems in the same location. An Internet Service Providers' equipment at local dial-in sites consists of banks or pools of modems configured in multi-line hunt groups, with one lead number serving as a central number to receive calls." *Id.*

scribers to the Internet are electronic mail, file transfers, Internet Relay Chat, and the ability to browse and publish on the World Wide Web. *See, e.g., American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D.Pa.1996), *aff'd, Reno v. American Civil Liberties Union*, --- U.S. ---, 117 S. Ct. 2329 (1997).

ISPs have been exempted from paying "access charges" to LECs for connecting them to the end user. *Third Report and Order* ¶ 288. In 1983, the FCC classified ISPs as "end users" rather than as "carriers" for purposes of the access charge rules. Id. As a result of this decision, ISPs purchase services from LECs "under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates." *Id.* ¶ 285. In a 1996 Order reviewing the 1983 "exemption" decision, the FCC "tentatively conclude[d] that the current pricing structure should not be changed so long as the existing access charge system remains in place." *Id.* 288.

E. TELECOMMUNICATIONS VS. INFORMATION SERVICES

The FCC has repeatedly made it clear that "telecommunications" and "information services" are "mutually exclusive" categories. *Universal Service Report* ¶ 59. *See also id.* ¶ 57 ("[W]e find strong support in the text and legislative history of the 1996 Act for the view that Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services.") According to the FCC, such an interpretation is "the most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service." *Id.* ¶ 59. The distinction drawn by the FCC mirrors the definitions of "telecommunications" and

"information services" in the Act. "Information service" is defined by the Telecommunications Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20) (1998). "Telecommunication" however, is defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

Following the definitions in the Act, the FCC has found that the key distinction between telecommunications and information services rests on the functional nature of the end user offering. *Universal Service Report* ¶¶ 59, 86. "[I]f the user can receive nothing more than pure transmission, the service is telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." *Id.* ¶ 59.

Applying these definitions, the FCC has determined that Internet services are "information services" and not "telecommunications." *See, e.g., Universal Service Report* ¶ 66 ("Internet service providers themselves provide information services, not telecommunications .."); *Id.* ¶ 80 ("The provision of Internet access service . . . is appropriately classed as an 'information service.' "); *Id.* ¶ 81 ("Internet access provider[s] . . . are appropriately classified as information service providers.").

There may be some rare instances, however, when the services provided by the Internet are actually telecommunications. For example, the FCC indicated in its recent report that "phone-to-phone telephony"[6] lacks the characteristics of information services, and could actually be classified as telecommunications services. *Id.* ¶ 89. However, the FCC reserved making any final ruling on the subject until a more complete record is established. *See id.* ¶ 90. *See generally* Robert M. Frieden, *Dialing for Dollars: Should the FCC Regulate Internet Telephony?*, 23 Rutgers Computers & Tech. L. J. 47 (1997) (discussing the various policy issues that may arise from the development of Internet telephony).

F. THE INTERCONNECTION AGREEMENTS

At the heart of this dispute are the Interconnection Agreements which were entered into between Ameritech and the various Carrier defendants. All of the Agreements provide that "local traffic" which terminates on the "other Party's network" is eligible for reciprocal compensation. Specifically, the Agreements state that:

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[6] In phone-to-phone telephony, "the customer places a call over the public switched telephone network to a gateway, which returns a second dial tone, and the signaling information necessary to complete the call is conveyed to the gateway using standard in-band (i.e., DMTF) signals on an overdial basis. The customer's voice or fax signal is sent to the gateway in unprocessed form (that is, not compressed and packetized). The service provider compresses and packetizes the signal at the gateway, transmits it via IP to a gateway in a different local exchange, reverses the processing at the terminating gateway and sends the signal out over the public switched telephone network in analog, or uncompressed digital, unpacketized form." *Universal Service Report* 84, n. 177.

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Defendant's] network for termination on the other Party's network.

(MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1.) The Agreements define "local traffic" as "local service area calls as defined by the Commission," (TCG § 1.43), or as:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; *provided* that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis in original). The Agreements further provide that "switched exchange access service" is not eligible for reciprocal compensation. (MFS § 5.8.3; TCG § 5.6.2; MCI § 4.7.2; AT&T § 4.7.2; Focal § 5.8.2). "Switched exchange access service" is defined in the Agreements as "the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service," which includes "Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services." (MFS § 1.56; TCG § 1.65; MCI sch. 1.2; AT&T sch. 1.2; Focal § 1.66.)

The parties do not contend that the Agreements specifically classify the Internet as either local traffic or exchange access service. Indeed, this court could not find an express reference to the Internet in the various Interconnection Agreements.

G. THE COMMISSION'S DECISION

The Commission's Order concludes that Ameritech Illinois must pay reciprocal compensation to the Carrier defendants with respect to calls placed by Ameritech Illinois customers through the Internet via ISPs who are customers of the Carrier defendants.[7] In its decision, the Commission

[7] The Order states in the pertinent part:

> IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 14 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois.
>
> IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extend Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.
>
> (Order at 16.)

first reviewed the procedural history of the case and the positions of the parties. (Order at 1-10.) The Commission then presents a four-page analysis of the relevant facts and law for reaching its decision that reciprocal compensation applies to Internet calls.

The Commission's first reason for its decision is based on the language of the Agreements themselves. The Interconnection Agreements state that reciprocal compensation applies "for transport and termination of Local Traffic *billable* by Ameritech [or the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's [or the Carrier Defendant's] network for termination on the other Party's line." (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) (emphasis added). According to the Commission, the "billable" language in the Agreements "unambiguously provide[s] that reciprocal compensation is applicable to local traffic billable by Ameritech." (Order at 11.) Reasoning that Ameritech charges end users local service charges when completing calls that terminate at a competitor's ISP customer, the Commission concluded that "the plain reading" of the billable language necessitates reciprocal compensation charges for ISP calls. (Order at 11.)

The second rationale employed by the Commission is again dependent on the language of the Agreements. Specifically, the Agreements provide that reciprocal compensation

applies for calls *terminated* on the other party's line. (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) The Commission found that a call to an ISP *terminates* at the ISP before it is connected to the Internet. (Order at 11.) The Commission was persuaded by the Carrier defendants' definition of industry practice, in which call termination "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned." (Order at 11, citing WorldCom Ex. 1.0 at 7.) According to the Commission, "termination" in the context of the Agreements does not mean that the call ends. (Order at 11.) The Commission's view of termination of the call leads to the conclusion that such calls are correctly classified as local calls under the Agreements.

In the final part of the Commission's analysis, it rejected the argument made by Ameritech that a call's distance must be determined on an "end-to-end" basis, that is, from the end user to the web site. Such a reading would be an "outdated conception of the telecommunications network" and would be inconsistent with the Act and "the FCC's own decisions." (Order at 11-12.) In a rather confusing explanation of this point, the Commission states that Internet calls are unlike Feature Group A ("FGA") calls, which are classified in the Agreements as "switched access service." FGA calls are long distance calls that end users initiate by dialing a local seven-digit number. When the user dials the local number, she is connected to the interexchange carrier's toll switch which gives the user a second dial tone, at which point the user dials a long distance number. Although Ameritech argued that FGA calls are functionally identical to Internet ISP calls, the Commission found that such calls are distinguish-

able because FGA calls undeniably involve telecommunications traffic with the end user to which the call is terminated. In contrast, Internet calls involve what the FCC has found to be "information services" after the call is terminated to the ISP. "Based on these critical distinctions [between telecommunication traffic and information service] the FCC has determined that ISP traffic is *not* an exchange access service, but rather, ISPs should be treated as 'end users.' " (Order at 12.) (emphasis in the original).

H. FCC RULINGS

This court's role in reviewing the ICC's decision requires that it examine the court's interpretation of federal law de novo. *See* discussion, *supra*, Part II.B. Examining the FCC's interpretation of the relevant issue is therefore necessary because if this court finds that the FCC has a reasonable and consistently held interpretation of the applicable law, those rulings would be entitled to substantial deference. *Cf. Arkansas v. Oklahoma*, 503 U.S. 91, 110, 112 S. Ct. 1046, 1059 (1992); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). *See also Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) ("An agency's construction of its own regulation binds a court in all but extraordinary cases."); *United States v. Baxter Healthcare Corp.*, 901 F.2d 1401, 1407 (7th Cir. 1990) (finding that a court must give great deference to agency's interpretations of its own regulations).

After reviewing relevant FCC precedent, this court finds that the FCC has not reached a coherent decision on the issue of the compensation of LECs providing Internet access. This result is due, in part, to the fact that the Internet, as a relatively new development to the telecommunications world,

presents unique questions that have not previously been addressed by FCC decisions and policy. For example, the FCC recently initiated a Notice of Inquiry seeking comments on the effect of the Internet and other information services on the telephone network, noting that the Internet creates perplexing policy issues:

> [T]he development of the Internet and other information services raise many critical questions that go beyond the interstate access charge system that is the subject of this proceeding. Ultimately, these questions concern no less than the future of the public switched telephone network in a world of digitalization and growing importance of data technologies. Our existing rules have been designed for traditional circuit-switched voice networks, and thus may hinder the development of emerging packet-switched data networks. To avoid this result, we must identify what FCC policies would best facilitate the development of the high-bandwidth data networks of the future, while preserving efficient incentives for investment and innovation in the underlying voice network. In particular, better empirical data are needed before we can make informed judgments in this area.

Third Report and Order ¶ *311.*

This court's determination that no clear rule on the issue exists is confirmed by the fact that on June 20, 1997, the FCC expedited consideration of a request for clarification of its rules from the Association for Local Telecommunications. The issue under review is identical to the issue at bar: whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act for transport and termination of traffic to LECs that are information service providers. *See Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 F.C.C. Rcd. 9715 (July 2, 1997). Thus, the precise issue under review in the instant case is currently being decided by the FCC. As of the date of this Memorandum Order and Opinion, the issue has not been resolved. *See also* Memorandum of the Federal Communications Commission as Amicus Curiae, Mem. at 2, June 29, 1998, *filed in Southwestern Bell*, No. 98 CA 043 (stating that the issue of the rights of LECs to receive reciprocal compensation is pending before the FCC in an administrative proceeding and remains unresolved). Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case.

The Carrier defendants and the Commissioners argue that reciprocal compensation applies only to telecommunications, and, therefore, the fact that ISPs generally do not provide telecommunications necessitates a finding that reciprocal compensation must be paid to the terminating LEC. Ameritech responds, however, that such argument is a red herring. Ameritech relies heavily on the FCC's statement in its 1998 *Universal Service Report* that the issue of reciprocal compensation does not "turn on" the telecommunications/information service distinction:

> We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to re-

> ciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.

¶ 106, n. 220. Although the statement of the FCC in Footnote 220 is ambiguous as it relates to the issues involved here, this court agrees with Ameritech to the extent that any rationale regarding whether reciprocal compensation must be paid for such calls cannot hinge entirely on the information service/telecommunications distinction. This does not mean, however, that the distinction does not exist[8] (*see* discussion, *supra*, Part III.E) or that an understanding of the distinction is wholly irrelevant to a discussion of the issue at bar.

Despite the fact that Ameritech shuns the information service/telecommunications distinction, it nonetheless argues that language in the FCC's reports indicating that Internet information services are provided *via telecommunications* is relevant to their argument. *See Universal Service* ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.' "); *Id.* ¶ 3 (stating that the Internet "stimulates our country's use of telecommunications"; ISPs are "major users of telecommunications."); *Id.* ¶ 15 ("[W]e clarify that the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications.' "). Nonetheless, for the same reasons stated against the defendants' use of the distinction, this

[8] For example, at oral argument, counsel for the plaintiff clearly stated that it is "undisputed" that ISPs provide information services and are not providers of telecommunications. (Tr. at 31.)

court finds that the fact that ISPs use telecommunications is not the determining factor in the instant case.

Ameritech's reliance on language in the *Universal Service Report* indicating that the telecommunications backbone to the Internet is "interstate telecommunications" is more persuasive authority for of the plaintiff's view. *See, e.g., Universal Service Report* ¶ 55 ("We conclude that entities providing pure transmission capacity to Internet access or backbone providers provide *interstate* '*telecommunications*.' Internet service providers themselves generally do not provide telecommunications.") (emphasis added); *Id.* ¶ 67 ("The provision of leased lines to Internet service providers, however, constitutes the provision of *interstate telecommunications*. Telecommunications carriers offering leased lines to Internet service providers must include the revenues derived from those lines in their universal contribution base.") (emphasis added).

Although the characterization of leasing lines to local ISPs as providing "interstate telecommunications" causes this court to pause, ultimately this court is not convinced that such language compels a finding under federal law that a call from an end user to an ISP is an interstate call and that termination for billing purposes does not occur at the ISP. This court is especially skeptical of the above cited language from the *Universal Service Report* because of the context in which the term "interstate" is discussed. A great deal of the *Universal Service Report* discusses the future of the FCC's goal of providing "universal service," that is, services to all customers throughout the country, "including low-income customers and those in rural, insular, and high cost areas . . . at rates that are reasonably comparable to rates charged for similar service in urban areas." 47 U.S.C. § 254(b)(3)(1998). Under

the Telecommunications Act, carriers "that provide interstate telecommunications services must contribute to federal universal service mechanisms." *Universal Service Report* ¶ 55. A concern arises with the development of the Internet because, as information service providers, ISPs do not contribute directly to the development of universal service. *Id.*

Given this background, this court is not convinced that the use of the term "interstate" in the context of discussing the Internet means that the FCC has made a determination that calls to the Internet are "interstate" for billing purposes. Nor is this court persuaded that such statements would require the overturning of a state commission's finding that such calls terminate locally at the ISP. Instead, the FCC has only provided that those who lease lines to ISPs provide interstate telecommunications and therefore ISPs are contributing, albeit indirectly, to the goal of universal service. *Id.* In essence, by leasing their lines from telecommunications carriers that do contribute to the universal system, the ISPs are contributing to the continuation of the goal of universal coverage. *See id.* ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.' To the extent that the telecommunications inputs underlying Internet services are subject to the universal service contribution mechanism, that provides an answer to the concern . . . [that] there will no longer be enough money to support the infrastructure needed to make universal access to voice or Internet communications possible.") (footnote and internal quotations omitted).

The FCC has made statements acknowledging that calls to the Internet using a seven-digit number are "local." *See, e.g., In re Access Charge Reform*, First Report and Order, 12 F.C.C. Rcd. 15982, ¶ 342, n. 502 ("To maximize the

number of subscribers that can reach them through *a local call*, most ISPs have deployed points of presence.") (emphasis added). The FCC has also indicated that rate structures for such calls are appropriately addressed by state, rather than federal, regulators. *See id.* ¶ 345-46 ("ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.") (emphasis added).[9]

Ameritech further argues, relying on decisions involving the creation of the access charge regime (*see* discussion, *supra*, Part III.B, III.D), that the FCC has ruled that

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[9] Ameritech states that most calls to ISPs are subject to flat (low) rate calls, and Internet calls tend to be longer than other types of calls. Under the current rate structure, Ameritech contends, if reciprocal charges are applicable to such charges, Ameritech must pay more to the terminating LEC than it can bill its customers. Implicit in Ameritech's argument is the assertion that the reciprocal payments thus incurred far exceed the cost to the LEC for terminating the call. If that is true, it is unclear how the state regulators can adequately restore equity to the process except through some bifurcation which would assign a different reciprocal rate to ISP traffic. Merely raising the rates that the originating LEC charges its local customers would simply finance a windfall for the terminating LEC out of the pocketbooks of customers.

Internet Calls are exchange access calls. For example, in 1983 the FCC stated that:

> Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. . . . Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.

MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (1983). Although the FCC has continued to uphold its ruling that ISPs are exempt from any access charges (*see, e.g., Universal Service Report* ¶ 146), the FCC has clarified its position in more recent rulings. In particular, the FCC has stated that due to "the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established." *In the Matter of Access Charge Reform*, First Report and Order, CC Docket Nos. 96-262 et al., FCC 97-158, ¶ 345 (May 16, 1997). Indeed, instead of classifying ISPs as IXCs, the FCC has maintained that ISPs are, and should remain, classified as end users. *Id.* ¶ 348. Furthermore, the FCC has concluded, at least "tentatively," that the current structure of charging ISPs as end users should "not be changed so long as

the existing access charge system remains in place." *Third Report and Order* ¶ 288.

In conclusion, this court finds that at the time that the Agreements were entered into there was no clear FCC position on whether or not calls to Internet ISPs are interstate exchange access calls. The FCC is currently reviewing the very question at issue in this case. Accordingly, the answer to the question of the interpretation of the Agreements lies principally in contract interpretation. These are questions that this court must review with substantial deference to the ICC's findings.

I. FINAL ANALYSIS OF ICC DECISION

The ICC's decision states three reasons for rejecting Ameritech's argument. This court finds that the third reason, which is based principally on the information services/telecommunications distinction, is not relevant to the case at bar. (*See* discussion, *supra*, Part III.H.) However, as the third reason does not include incorrect statements of federal law and this court finds that the remaining two reasons stated in the Commission's opinion are sufficient to uphold the decision, Ameritech's request that the decision be set aside is rejected.

The third section of the ICC's analysis is less clear than the other two arguments. Indeed, the third argument is jumbled and difficult to decipher. Without clearly linking its reasoning to its decision to uphold reciprocal compensation for Internet calls, the ICC states in one stream of reasoning (encompassing only one page of text) that: (1) end-to-end jurisdiction is "outdated"; (2) FGA calls are distinguishable from Internet calls; (3) the Internet provides "information services" and not "telecommunications"; and, (4) ISPs are

not exchange access service, but rather "end users." (Order at 11-12.) In fact, this section of the Commission's opinion reads more like a selective review of FCC precedent than solid reasoning for supporting reciprocal compensation for Internet calls.

For the reasons already discussed, this court finds that these statements of the Commission, though overstated, are not expressly violative of existing federal law. However, to the extent that this portion of the Commission's decision relies heavily on the distinction between information service and telecommunications, this court rejects that analysis. The FCC has warned that this distinction, although it does exist, is not the answer to whether the LEC is entitled to reciprocal compensation for terminating Internet traffic. *See Universal Service Report* ¶ 106, n. 220. Nonetheless, the Commission's analysis does not "turn on" this distinction. Furthermore, as the decision stands on its own based on the first two rationales, this court does not find that the Commission's discussion of the information service/telecommunications distinction provides a basis for reversal.[10]

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[10] Ameritech also criticizes the ICC's use of the distinction with Feature Group A calls ("FGA"), which is mentioned in the ICC's highlighting of the information service/telecommunications distinction in the third portion of its analysis. Ameritech stresses the point that FGA calls are "functionally and technically" indistinguishable from an Internet call. (Ameritech Merits Brief at 10.) However, Ameritech does not cite a single statute or ruling in support of this view. Although it may be appealing to analogize the two types of calls as functionally similar, this court will not be swayed by such argument. As previously discussed, a special provision in the Interconnection Agreements explicitly excludes FGA calls from paying reciprocal compensation. No such exception is provided for Internet calls.

Close analysis of the remaining two rationales reveals that such reasoning is consistent with federal law and is supported by substantial evidence. These two arguments are: (1) the Agreements use of the word "billable" requires reciprocal compensation for Internet traffic because Ameritech bills such calls as local; and, (2) the industry use of the word "terminates" requires a finding that the call to the ISP terminates at the ISP.

First, the "billable" rationale is a reasonable interpretation of the contracts. Ameritech argues that such a reading is wrong as a matter of law, contending that the Agreements define local traffic based not on billing treatment, but on points of origin and termination of the traffic. (Ameritech Resp. at 14.) Ameritech further informs that the billing practice for Internet calls is identical to the billing treatment of FGA calls, and therefore the Commission's holding would make FGA calls "local." Ameritech does not cite any cases to support this proposition. Furthermore, Ameritech ignores the fact that the Agreements specifically exclude FGA calls from the reciprocal compensation provision. No such explicit provision is found in the Agreements regarding Internet calls. In fact, the Internet and ISPs are not even mentioned in the Agreements. No doubt the next time Interconnection Agreements are negotiated between the parties such a provision regarding the termination of Internet calls will be the subject of vigorous discussion. However, this court will not impose such a provision into the Agreements as written.

Although reasonable persons may differ on the interpretation of the language of the Agreements, a finding that calls that are billed as local must receive reciprocal compensation is not violative of current federal law. Furthermore, such a finding is a reasonable interpretation of the contracts and is neither arbitrary nor capricious. It is undeniable that Ameritech has consistently billed its customers for their calls to ISPs as local calls. This court therefore concurs with the ICC's conclusion that the Ameritech billing scheme warrants a finding that such calls are subject to reciprocal compensation.

Second, this court finds that the ICC's determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech's argument that federal law requires that this court adopt a "jurisdictional" standard for termination that would be measured on an "end-to-end" basis is not convincing. Although Ameritech is correct that "end-to-end" language is used in some earlier FCC decisions in different contexts,[11] the FCC has not issued any rulings indicating that

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[11] *See, e.g., Southwestern Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68*, Order Designating Issues for Investigation, 3 F.C.C. Rcd. 2339, ¶ 28 (1988) (rejecting the view that two calls are created by the use of a 1-800 number for a credit card call and stating that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication."); *Petition for Emergency Relief and Declaratory Ruling Filed by the Bellsouth Corporation*, 7 F.C.C. Rcd. 1619, 1619-21 (1992) (finding that a call to an out-of-state voice mail service is a single interstate communication); *Long-Distance/USA, Inc.*, 10 F.C.C. Rcd. 1634, ¶ 13 (1995) (finding that 1-800 calls are a single communication; "both court and Commission decisions have consistently held that the communications path is no more significant than the facilities used to complete such communications").

Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one "end." Furthermore, all of the cases cited by the plaintiff in support of its end-to-end argument are from the pre-1996 Act era. (*See* Ameritech Mem. at 17-18.)

Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. *See, e.g., Third Report and Order* ¶ 288. Given the absence of an FCC ruling on the subject, this court finds it appropriate to defer to the ICC's finding of industry practice regarding call termination. Indeed, the Internet Agreements themselves authorize the Commission to determine when a call qualifies as "local."[12]

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[12] TCG's Agreement provides that "local traffic" is "local service area calls as defined by the Commission." (TCG § 1.43.) The Agreements of the other Carrier defendants provide that a "local call" is:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise *determined by the FCC or Commission* for purposes of Reciprocal Compensation; provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis added).

The ICC's decision included the following finding of fact regarding call termination:

> [W]e are persuaded by Mr. Harris' explanation of industry practice with respect to call termination. He testified that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned . . ."

(Order at 11.) This definition of "termination"[13] is crucial to understanding the meaning of the Agreements, as the Agreements specifically use the word termination in defining reciprocal compensation. When a customer of a LEC dials the ISP's local, seven-digit number, the customer is connected to the ISP. Once this "call connection" is established between the caller and the telephone exchange service of the seven-digit number, the call is deemed "terminated" for purposes of the Agreements. The fact that the ISP then connects the user to the Internet, where the user may access unlimited web sites, does not alter the fact that the call has

[13] The ICC's definition of "termination" closely follows that adopted by the ICC. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 1040 (Aug. 8, 1996) ("We define 'termination,' for purposes of section 251(b)(5) [the reciprocal compensation provision of the Telecommunications Act], as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.").

been "terminated" at the ISP for purposes of reciprocal compensation.

J. THE ICC ORDER VIOLATES SECTION 251(G) OF THE ACT

Ameritech's final argument is that the ICC's order violates Section 251(g) of the Telecommunications Act. Pursuant to Section 251(g).

> On or after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

According to Ameritech, because no court order, consent decree, regulation, order, or policy of the FCC provided for the payment of reciprocal compensation prior to February 7, 1996, reciprocal compensation cannot now apply. Ameritech states that reciprocal compensation could only apply if the FCC were to explicitly so require by regulation. Such an argument is circular, and escapes the logic of this opinion. Section 251(g) merely provides that local exchange carriers

must provide services with the same "equal access and non-discriminatory interconnection restrictions and obligations" as prior to the passage of the Telecommunications Act, until such restrictions or obligations are superseded. As this court has found that the FCC has no prior ruling that controls in the instant case, there is no ruling that could possibly be violated by ordering continued payments of reciprocal compensation by the plaintiff. Furthermore, as the defendants point out, Ameritech did indeed pay reciprocal compensation for local calls prior to the passage of the Act.

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, this court affirms the Commission's determination that Local Exchange Carriers are entitled to reciprocal compensation under the Interconnection Agreements for Internet calls. The stay of the Commission's order is continued for an additional thirty-five (35) days to allow the parties to appeal.

Enter:

(Signed)
David H. Coar
United States District Judge

Dated: July 21, 1998.

APPENDIX H - ENTRY OF JUDGMENT BY THE DISTRICT COURT, AUGUST 4, 1998.

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge:
David H. Coar

CASE NUMBER: 98 C 1925 DATE: 8/4/1998

CASE TITLE: Illinois Bell v. Worldcom Technologies, et al

[Parts of form left blank omitted.]

(Other docket entry) Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court hereby directs entry of final judgment as to all defendants except Illinois Commerce Commission. This Court has currently pending motions to dismiss the Illinois Commerce Commission from this action. Because of the novelty and urgency of the issues presented on the merits of the action and because the Eleventh Amendment issues presented by the Commission's Motions to Dismiss were not related to the merits of the underlying claim, this Court directed the Commission to participate in briefing of the issue on the merits without prejudice to its rights to proceed on its Eleventh Amendment Motions. For the same reasons, this Court determines that there is no reason to delay the entry of final judgment on the merits.

[signed] David H. Coar

United States District Court
Northern District of Illinois
Eastern Division

Rule 54(b)

JUDGMENT IN A CIVIL CASE

Illinois Bell

v. Case Number: 98 C 1925

Worldcom Technologies, et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this Court affirms the Commission's determination that Local Exchange Carriers are entitled to reciprocal compensation under the Interconnection Agreements for Internet calls. The stay of the Commission's order is continued to thirty-five days after (i) the entry of judgment in this case or (ii) the entry of an order of dismissal in this case, to allow the parties to appeal.

Judgment is hereby entered against the plaintiff Illinois Bell Telephone and in favor of the defendants Worldcom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.; Teleport Communications Group, Inc.; MCI Telecommunications Corporation; MCIMETRO Access Transmission Services, Inc.; AT&T Communications of Illinois, Inc. and Focal Communications Corporation.

Michael W. Dobbins, Clerk of Court

Date: 8/4/1998

Patricia McQurter-Figgs,
Deputy Clerk

MAY 29 2001

Supreme Court, U.S.
FILED
MAY 29 2001
OFFICE OF THE CLERK

No. 00-878

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether a state commission's action related to the enforcement of a previously approved section 252 interconnection agreement is a "determination under [section 252]" and thus reviewable in federal court under 47 U.S.C. §252(e)(6).

Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

PARTIES TO THE PROCEEDING

Petitioners are Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, who are currently, and were at the time of the final order of the United States Court of Appeals for the Seventh Circuit denying rehearing (Pet. App. 1a-2a), the members of the Illinois Commerce Commission. (At the time of the filing of the federal district court action in this case, the commissioners were Dan Miller, Richard Kolhauser, Ms. Kretschmer, Karl McDermott and Brent Bohlen.)

Respondents are: Illinois Bell Telephone Company d/b/a Ameritech Illinois; WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.; MCI Telecommunications Corp.; MCImetro Access Transmission Services, Inc.; Focal Communications Corp.; Teleport Communications Group, Inc.; and AT&T Communications of Illinois, Inc.

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OPINIONS BELOW

The opinion of the court of appeals as initially issued (Pet. App. 6a-22a) is reported at 179 F.3d 566. The opinion was amended by subsequent order (Pet. App. 3a-5a), which was not reported. The opinion of the district court (Pet. App. 23a-35a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered June 18, 1999 and amended August 9, 1999. That court denied Petitioners' petition for rehearing on August 9, 2000. Justice Stevens granted Petitioners' application to extend the date for filing the petition for *certiorari* to November 28, 2000, and the petition was filed that day. The petition was granted on March 5, 2001. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, U.S. Const., art. I, § 8, cl. 3, provides that "[t]he Congress shall have Power To regulate Commerce with foreign Nations, and among the several States ."

The Supremacy Clause, U.S. Const., art. VI, cl. 2, is reprinted at Pet. App. 36a.

The Eleventh Amendment, U.S. Const., amend. XI, is reprinted at Pet. App. 36a.

Title 47, United States Code, §§ 251 and 252, are reprinted in the Appendix to this Brief. Of particular relevance here, § 252(e)(6) provides in part that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [47 U.S.C.] section 251 and this section."

STATEMENT OF THE CASE

This case involves a suit brought in the United States District Court for the Northern District of Illinois by Respondent Ameritech Illinois ("Ameritech"). Included as defendants, along with other Respondent telecommunications carriers, were the five members of the Illinois Commerce Commission ("ICC"), who were named "in their official capacities and not as individuals." Jt. App. 125a. The suit sought review of an order of the ICC that had disposed of complaints the other carriers had filed against Ameritech. In these complaints the carriers charged that Ameritech had breached interconnection agreements with them by failing to make certain payments. The ICC agreed with the carriers and directed Ameritech to make the disputed payments. Ameritech sought review of the ICC decision in federal district court pursuant to 47 U.S.C. § 252(e)(6), part of the federal Telecommunications Act of 1996.

A. The Illinois Commerce Commission. The ICC is an agency of the State of Illinois, and was created in 1913 as the State Public Utilities Commission, *American Nat'l Bank & Trust Co. v. Pennsylvania R. R. Co.*, 35 Ill. 2d 145, 148 (1966). Its conduct is governed by the Illinois Public Utilities Act ("IPUA"), 220 ILCS 5/1-101 *et seq.* The ICC consists of five members appointed by the Governor. 220 ILCS 5/2-101. "Every finding, order or decision approved by a majority of the members of [the ICC] shall be deemed to be the finding, order or decision of the Commission." *Id.* The ICC is charged with the "general supervision of all public utilities," 220 ILCS 5/4-101, as well as the enforcement of "the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal," 220 ILCS 5/4-201.

The ICC's duties include the adjudication of complaints, which may be brought by the ICC itself or by, *inter alia*, "any person or corporation." The Commission may hold

hearings on complaints, at which the complainants and respondents may be heard and evidence received. After the hearing the ICC is required to make findings of fact and enter an order based on those findings. 220 ILCS 5/10-108, 10-110. In the event the ICC fails to enter an order within a specified time, any party may seek an order of mandamus from a state trial court compelling the ICC to act within sixty days. 220 ILCS 5/10-108.[1] ICC decisions are subject to judicial review in the Illinois Appellate Court and the Illinois Supreme Court. 220 ILCS 5/10-201 and 202.

B. The Telecommunications Act of 1996. On February 1, 1996, Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("the 1996 Act" or "the Act"). This extensive legislation amended, but did not repeal, the Federal Communications Act of 1934 ("the 1934 Act"). Under the 1934 Act (and even before its passage), regulation of telephone service had been divided between the federal and state governments. The federal government, acting through the Federal Communications Commission ("FCC"), had regulated interstate, long-distance service, and state governments, acting primarily through state public utilities commissions like the ICC, had regulated local (intrastate) service. 47 U.S.C. § 152(a) & (b); *Louisi-*

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[1] These procedures apply to complaints involving telecommunications rates and services. 220 ILCS 5/13-101. After passage of the Telecommunications Act of 1996, discussed *infra*, the IPUA was amended to add specified substantive bases for finding that a telecommunications carrier had "impede[ed] the development of market competition." These included, but were not limited to, eight grounds, one of which was violating or delaying implementation of an interconnection agreement entered into under § 252 of the 1996 Act, 47 U.S.C. § 252. 220 ILCS 5/13-514 and 514(8) (Pet. App. 46a-47a). These amendments did not alter the ICC's general obligation to adjudicate complaints under 220 ILCS 5/13-515.

ana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 403-04 (1999) (Thomas, J. concurring and dissenting). The 1996 Act added new sections, and amended existing ones, in a number of areas, including telecommunications (Title I).

Before the 1996 Act, local telephone service was considered a natural monopoly and regulated as such. *Iowa Util. Bd.*, 525 U.S. at 371. One of the principal changes the Act made was to introduce competition into local telephone markets. In order to accomplish this goal, the Act imposes certain general duties on all local exchange carriers ("LECs") and particular obligations on existing or incumbent LECs. 47 U.S.C. § 251. All LECs are required to avoid unreasonable or discriminatory conditions on the resale of telecommunications services (§ 251(b)(1)), to maintain elements of those services in ways that facilitate access among networks by other providers (§ 251(b)(2)-(4)), and to establish arrangements for reciprocal compensation to one another for transporting and terminating calls placed by each others' customers (§ 251(b)(5)).

Competition in the local telephone markets would require new entrants. Recognizing that new providers could not rapidly and efficiently duplicate the local networks that had been developed over time by incumbent LECs, Congress required each incumbent LEC "to share its network with competitors." *Iowa Util. Bd.*, 525 U.S. at 371. As a general obligation, all telecommunications carriers were required to interconnect with each others' facilities. 47 U.S.C. § 251(a)(1). Section 251(c) imposed additional obligations on incumbent LECs, including Ameritech, to allow interconnection with their existing networks by any carrier requesting it, to negotiate in good faith agreements providing for interconnection, to let other carriers gain unbundled access to discrete elements or features of their networks, and to allow purchase of their services at wholesale prices for resale.

The vehicles for achieving network interconnection under § 251(c) are agreements negotiated in accordance with § 252 of the Act. Section 252 establishes procedures for negotiating, arbitrating, and approving agreements for interconnection, services, or network elements between incumbent LECs and requesting carriers.[2] It creates a four-step process for accomplishing this task and designates state utilities commissions as the primary regulatory actors.

First, the Act allows incumbent LECs and requesting carriers to negotiate their own agreements privately. If they do, § 252(a)(1) relieves them of the obligations of subsections 251(b) and (c) and allows them simply to submit the agreements to the state commission for approval under § 252(e), as discussed below. The Act also provides that a party to negotiations can ask the state commission to mediate any differences that may arise (§ 252(a)(2)).

Second, if private or mediated negotiations prove unsuccessful after a specified time, § 252(b) provides for compulsory arbitration of disputed terms by the state commission. The commission must resolve all unresolved issues within nine months from the time the incumbent LEC receives the initial request for negotiation. *See* § 252(b)(4)(A) & (C).

Third, § 252(e)(1) requires that all interconnection agreements be submitted to the state commission for approval. The grounds on which a commission can reject an agreement or part thereof depends upon how it was reached. Where the parties have negotiated their own agreement, or part thereof, a commission may reject it only if it finds either that the agreement or provision discriminates against a carrier not a

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[2] Although § 252 and these agreements provide for several aspects of local telephone service listed in § 251(c), including but not limited to interconnection, this brief will refer to these agreements generally as "interconnection agreements."

party to the agreement or that it is not in the public interest, § 252(e)(2)(A). An agreement (or part thereof) adopted by arbitration, however, may be rejected if it fails to comply with § 251, with any regulations promulgated by the FCC under § 251, or with pricing standards prescribed in § 252(d). See § 252(e)(2)(B). Once a final agreement is submitted, a commission must act on it within ninety days if it was a negotiated agreement (or portion of an agreement), or thirty days if it was an arbitrated agreement (or arbitrated portion of an agreement). If the commission does not, the agreement is deemed to be approved without further action, § 252(e)(4).

The Act also addresses a state commission's "fail[ure] to act to carry out its responsibility under" § 252. In that event, the FCC is directed to issue an order "preempting" the state commission and assume that commission's responsibilities. *See* § 252(e)(5).

Fourth, Congress addressed judicial review of determinations made under § 252. Initially, § 252(e)(4), the section that compels submission of interconnection agreements for approval by state commissions, adds that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." In addition, § 252(e)(6) provides as follows:

> **Review of State commission actions.** In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or

> statement meets the requirements of section 251 and this section.

C. The Interconnection Agreements in This Case. Following the passage of the Act, Respondents Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom")[3], Focal Communications Corporation of Illinois ("Focal"), AT&T Communications of Illinois, Inc. ("AT&T"), and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (jointly "MCI") (collectively "the competitive carriers") all initiated negotiations with Respondent Ameritech pursuant to 47 U.S.C. §§ 251(c)(2) and 252(a)(1). They sought to reach agreements that would allow them access to Ameritech's existing local network. Ultimately, agreements were reached in all cases and submitted to the ICC for approval in accordance with § 252(e)(1). The TCG, WorldCom, and Focal agreements were privately negotiated without any ICC involvement. The MCI and AT&T agreements were arbitrated by the ICC in part, but none of the arbitrated provisions concern the reciprocal compensation issues underlying this case. Accordingly, all of the reciprocal compensation provisions in the agreements were privately negotiated. Pursuant to § 252(e)(1), the ICC approved all of the interconnection agreements at various dates between July 30, 1996 and April 28, 1997. Jt. App. 132a. No party sought judicial review of the reciprocal compensation provisions of the agreements.

D. Proceedings in the Illinois Commerce Commission. In September and October of 1997, after the agreements between Ameritech and the competing carriers had been in effect for months (and in the case of WorldCom, over a

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[3] The agreement to which Respondent WorldCom Technologies, Inc. is a party was initially sought by MFS Intelenet of Illinois, Inc., to which WorldCom is the successor in interest. *See* p. ii *supra*.

year), Respondents TCG, WorldCom and MCI filed complaints with the ICC. Jt. App. 52a-95a. Each competing carrier charged that Ameritech had breached the terms of its interconnection agreement. Jt. App. 53a, 79a, 93a. According to each complaint, Ameritech violated the agreements by refusing to compensate the competing carrier for transporting and terminating calls made by Ameritech customers to internet service providers ("ISPs") that were customers of the competing carrier. The carriers alleged that these were local calls for which reciprocal compensation was required under the agreements, but that Ameritech had stopped making payments for them and claimed that they were actually long-distance calls not covered by the agreements' reciprocal compensation provisions. Jt. App. 55a-56a, 81a-82a, 91a-92a. In each complaint, the complaining carrier invoked the jurisdiction of the ICC under the IPUA. *See* Jt. App. 52a, 90a (citing the IPUA generally, 220 ILCS 5/1-101 *et seq.)*; 79a (citing 220 ILCS 5/4-101, which provides the ICC with general supervision over public utilities). Shortly after these complaints were filed, Respondents Focal and AT&T filed petitions to intervene. The ICC consolidated the three complaints and two intervention petitions and evidentiary hearings were held, *see* Jt. App. 97a-99a.

On March 11, 1998, the ICC entered a unanimous written order granting the consolidated complaints and finding that the disputed calls to ISPs were subject to reciprocal compensation according to the terms of the interconnection agreements. Jt. App. 96a-124a. After reviewing the facts and positions of the parties, the ICC held that Ameritech's conduct in cutting off reciprocal compensation payments had violated the terms of those agreements. Jt. App. 114a, 121a. Accordingly, the ICC ordered Ameritech to compensate the complainants for all past due reciprocal compensation amounts and ordered Ameritech and the complainants to resume making payments. Jt. App. 123a.

E. Proceedings in the Courts. On March 27, 1998, Ameritech filed suit in the United States District Court for the Northern District of Illinois seeking review of the ICC's order under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Jt. App. 125a-145a. In its complaint, Ameritech named as defendants the Respondent competing carriers and the incumbent five members of the ICC "in their official capacities and not as individuals" but did not name the ICC itself. Jt. App. 125a, 130a. The commissioners moved to dismiss all claims against them, arguing, among other things, that the district court lacked subject matter jurisdiction over Ameritech's complaint under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331 and that the Eleventh Amendment barred the action against them. On May 20, 1998, the district court indicated that it would rule on the commissioners' motion separately from the merits of the complaint, without prejudice to the commissioners' positions regarding jurisdiction. *See* Pet. App. 24a; Jt. App. 181a.

On July 21, 1998, the district court issued its decision on the merits of the complaint, affirming the ICC's ruling that Ameritech owed the competing carriers reciprocal compensation payments for calls placed by Ameritech customers to the carriers' ISP provider customers. Jt. App. 147a-180a. The court rejected part of the ICC's analysis, but specifically agreed with the ICC's conclusions based on interpretation of the agreements and industry practice. Jt App. 175a. On August 4, 1998, the district court entered judgment against Ameritech (as Illinois Bell) and in favor of the competing carriers. Jt. App. 181a-183a. In addition, on May 14, 1998, Ameritech filed a petition for review of the ICC's order in the Illinois Appellate Court pursuant to 220 ILCS 5/10-201. That court granted Ameritech's motion to stay proceedings pending the resolution of this case.

On August 25, 1998, the district court denied the commissioners' motions to dismiss the actions. Pet. App. 23a-35a.

The court read § 252(e)(6) to give it exclusive jurisdiction to review the actions of the ICC in interpreting and enforcing agreements that had been formed and approved under the Act because such a reading was "consistent with the goals and structure of the Act," Pet. App. 28a, and added that allowing state courts to review state commission rulings would "run afoul of Congress' intent," Pet. App. 29a. The court further held that the suit was not barred by the Eleventh Amendment for two reasons: the State's "voluntary participation" in the scheme set forth in the Act constituted a waiver of its Eleventh Amendment immunity; and *Ex parte Young*, 209 U.S. 123 (1908), allowed the suit to proceed against individual commissioners because it sought prospective relief and involved ongoing violations of federal law. Pet. App. 30a.[4]

Ameritech appealed the district court's ruling on the merits to the United States Court of Appeals for the Seventh Circuit, and Petitioners cross-appealed on subject matter jurisdiction and immunity. On June 18, 1999, a panel of the court of appeals affirmed the district court's rulings, both on those issues and on the merits. Pet. App. 6a-22a. In considering the merits, the court declined to review the ICC's order for compliance with state law, confining itself instead to whether the ICC's order "violated federal law." Pet. App. 15a. In doing so, the court relied substantially on its earlier opinion in *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 168 F.3d 315, 320, *as amended*, 183 F.3d 558 (7th Cir. 1999) (*"MCI I"*). The court held, in accordance with *MCI I*, that state commission decisions "implementing" the Act were reviewable in federal court under 47 U.S.C. § 252(e)(6), Pet. App. 13a (citation and internal quotations

[4] The district court also rejected the commissioner's arguments based on res judicata, collateral estoppel and abstention. Pet. App. 30a-35a.

omitted). The court also followed *MCI I* in concluding that state commissions were intended by Congress to be parties to suits reviewing their "actions." *Id.* Rejecting Petitioners' Eleventh Amendment defenses, the court of appeals again relied on *MCI I*, in which it had decided that the state's participation in the Act's scheme for regulating local telecommunications constituted a constructive waiver of its sovereign immunity. Pet. App. 13a; *MCI I*, 183 F.3d at 564-66.[5]

On June 23, 1999, five days after the court of appeals initially decided this case, the Court issued its opinions in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), *Alden v. Maine*, 527 U.S. 706 (1999), and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999). Two days later, the court of appeals granted rehearing in the *MCI* case. On August 19, 1999, the panel in the instant case ordered the commissioners' petition for rehearing held in abeyance pending the decision on rehearing in *MCI I*. In doing so, the panel amended its earlier opinion to make more explicit its holding that federal review under 47 U.S.C. § 252(e)(6) was limited to whether a state commission's decision "depart[ed] from federal law," and that "[a] decision 'interpreting' an agreement contrary to its terms" gave rise to a problem "under the law of contracts, and therefore one for which a state court can supply a remedy." Pet. App. 4a-5a. The court noted that this "allocation of authority" would require an aggrieved party to present its federal law challenges

[5] The court of appeals did not address the commissioners' arguments regarding the application of *Ex parte Young*. It did observe that, even though the ICC itself had not been named as a defendant, the commissioners "[i]n their official capacity... are the Commission." Pet. App. 14a. The court also did not address the commissioners' arguments regarding the applicability of 28 U.S.C. § 1331, *res judicata*, collateral estoppel or abstention.

to a state commission's decision in federal court and then proceed in state court if it was unsuccessful. *Id.*

On rehearing in *MCI*, the Seventh Circuit reaffirmed its earlier decision. *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) ("*MCI II*"). The *MCI II* court considered *College Sav. Bank* but held that the doctrine of constructive waiver had survived that decision in certain contexts. *Id* at 339-40. The court held that the "structure" of § 252(e)(6) had clearly expressed Congress' intent to condition the States' participation in regulation under the Act upon waiver of sovereign immunity despite the absence of express language to that effect. *Id.* at 341. The court further held that Illinois had "unequivocally" waived its immunity, likening the ICC's participation in regulation under the Act to the acceptance of an "invitation to receive a 'gratuity'" from Congress. *Id.* 342-43. The court noted that Congress had the power under the Commerce Clause to assign all regulation of the telecommunications industry to the federal government, and concluded that after the passage of the Act "the regulation of interconnection agreements... [is] no longer, in the terms employed by the Supreme Court in *College Savings*, [an] 'otherwise permissible activit[y]' for the states." *Id.* at 343. Following the issuance of the *MCI II* opinion, the panel in the instant case denied rehearing, citing *MCI II*. Pet. App. 1a-2a.

Petitioners sought *certiorari* on November 28, 2000. Ameritech filed a petition for *certiorari* of its own seeking review of the decision of the court of appeals affirming the order of the ICC on the merits. That petition, No. 00-921, is still pending as of the filing of this brief.

SUMMARY OF ARGUMENT

This case presents three questions. The first is whether a provision that, by its terms, restricts federal jurisdiction to decisions made "under" a section governing the formation and approval of interconnection agreements should also be read, despite that plain limitation, to authorize review of decisions interpreting and enforcing those agreements after they have gone into effect. The answer to this question is that such decisions are not made "under" 47 U.S.C. § 252, and therefore review of them falls outside the jurisdiction conferred by § 252(e)(6). Section 252 prescribes in detail procedures relating to the *formation* and *approval* of interconnection agreements in accordance with the obligation to enter into them imposed by § 251, but says nothing at all about any subsequent commission action. Under the unambiguous language of the statute, then, cases involving the interpretation or enforcement of agreements already in place do not involve "determinations under [§ 252]", a necessary qualifier for review under § 252(e)(6).

This plain-language reading of the statute is consistent with the overall scheme of the 1996 Act, which introduced competition in local telephone markets by mandating that carriers provide access to each others' networks. That goal is accomplished through the making of interconnection contracts and does not further require micromanagement of the ensuing business relationships among carriers by federal courts. This reading of § 252(e)(6) is further consistent with the principle that federal review statutes should be considered strictly, as well as with the Act's own provision that state law is preempted only where expressly stated. It also reflects the behavior of the Respondents in this case, who included provisions in their voluntarily-negotiated agreements invoking Illinois law, and especially the actions of the competing carrier Respondents, who invoked state law and complained of breaches of contract in their complaints to the

ICC. Finally, even if this reading is only one acceptable construction of § 252(e)(6), the Court should adopt it to avoid the difficult constitutional issues raised by the second and third questions presented in this case.

The second and third questions relate to the State of Illinois' sovereign immunity. The second question asks whether Illinois has waived its Eleventh Amendment immunity by the act of participating in the regulatory scheme prescribed by Congress in § 252. As argued above, the ICC was not operating under the 1996 Act at all by interpreting and enforcing interconnection agreements. Even if the Court disagrees, there has been no waiver; indeed, Congress has not with sufficient clarity expressed its intent that state commission participation be conditioned on waiver. (As with jurisdiction itself, as described in Part I of our argument, almost everything involving § 252(e)(6) must, if it is to be found at all, be inferred from some source other than text.) For the State's own part, no express waiver of immunity is claimed, and the State has made no unequivocal declaration of its willingness to be sued.

Moreover, no constructive waiver occurred. After the Court's decision in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), no constructive waiver is possible when, as in the Act, Congress has exercised regulatory powers. In this case, rather than voluntarily waiving its immunity, the State has been unconstitutionally coerced into federal court by the threat of the exercise of federal power, and not induced to assent to suit by the bestowing of any "gratuity" by Congress. The threat made by Congress in § 252 was to exclude the State from regulatory activity that it has been conducting for decades. Although the Act represents a significant exercise of Commerce Clause power by Congress, even in the area of local telephone service, Congress has not preempted State regulation. Instead, it has explicitly authorized the FCC to preempt

state commission jurisdiction only when the state commission fails to act. The ICC's adjudication of these complaints was therefore "lawful"; indeed, it was core state governmental activity that the ICC was required to perform under both state and federal law. To decline to participate in the proceedings contemplated by § 252 was neither a practical nor legal option for the ICC. Absent a valid waiver, the district court was without jurisdiction to entertain this suit against Petitioners.

The third question involves whether, despite the State's immunity, federal court review of these decisions under § 252(e)(6) can nonetheless be achieved by means of an official-capacity action against individual commissioners under *Ex parte Young*. This suit, which in fact named the members of the ICC as defendants, was in reality a suit against the ICC itself, and therefore against the State of Illinois. The claimed legal errors, even errors of federal law, made by the ICC members acting within their jurisdiction were not violations of federal law and therefore did not strip the commissioners of their lawful authority simply because a reviewing federal court might later see the law differently.

Exposing individual commissioners to the full range of a federal court's powers would also be inconsistent with § 252(e)(6) itself. That subsection provides only for review of an order of a state commission, not for any action against an individual commissioner. The commissioners did nothing but consider and vote; the order they issued, and of which review was sought, was that of the ICC. Accordingly a suit against individual commissioners would exceed the limits of the remedial scheme provided for by Congress in § 252(e)(6), a detailed scheme that restricts the relief available to review of whether an agreement approved by a state commission complies with federal law. At most then, § 252(e)(6) contemplates relief analogous to customary judicial review of decisions of administrative bodies like the

FCC, and not lawsuits that would subject individual commissioners to a federal court's equitable powers.

ARGUMENT

I. STATE COMMISSION DECISIONS INTERPRETING AND ENFORCING INTERCONNECTION AGREEMENTS ARE NOT REVIEWABLE IN FEDERAL COURT UNDER § 252(e)(6).

The court of appeals held that the jurisdiction granted under 47 U.S.C. § 252(e)(6) encompassed the review of decisions of state utilities commissions that interpreted and enforced interconnection agreements, as well as those approving them or arbitrating their terms. In so holding, the court ignored language that plainly limits application of § 252(e)(6) to determinations made "under" § 252 itself. That provision, in turn, addresses only the formation and approval of agreements. The court's decision violated principles of statutory construction, some long-settled and some specifically set forth in the 1996 Act, by interpreting the statute according to its perceived general "scheme." Even if appropriate, moreover, an examination of the plan reflected in the Act, as well as the actions of the parties in this case, shows that the Act left responsibility for interpreting and enforcing agreements among local telephone providers, and the review of those actions, where they have always been: in the hands of the States.

A. The Plain Language of § 252(e)(6) Limits Federal Court Review of State Commission Actions to Those Involving the Arbitration or Approval of Interconnection Agreements.

In holding that § 252(e)(6) allowed the district court to review the decision of the ICC in this case, the court of appeals ignored the primary limitation of that provision, namely that the "determination" of which review is sought

be made "under" § 252 itself. The Court should reject the court of appeals' interpretation in favor of one giving effect to that plain and unambiguous restriction.

The starting point for the construction of any statute is the language of the statute itself. *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Where the language of the statute is plain, it is regarded as conclusive, and any inquiry as to its meaning should ordinarily end. *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 261 (1997); *GTE Sylvania*, 447 U.S. at 108. In addition, the nature of the provision at issue in this case also calls for a narrow reading. Because federal courts are limited in their jurisdiction, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), statutes conferring federal jurisdiction, including the power to review other bodies' decisions, are strictly construed. *Stone v. INS*, 514 U.S. 386, 405 (1995) ("Judicial review provisions... are jurisdictional in nature and must be construed with strict fidelity to their terms."); *Shamrock Oil Co. v. Sheets*, 313 U.S. 100, 108-09 (1941).

In this case, the court of appeals held that the district court had jurisdiction to entertain Respondent Ameritech's suit under § 252(e)(6), in which Ameritech sought review of a decision of the ICC interpreting and enforcing provisions of its interconnection agreements with the remaining Respondents. That section provided for such an action only as follows:

> In any case in which a State commission makes a determination *under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

47 U.S.C. § 252(e)(6) (emphasis supplied).

The language of this provision plainly limits the type of state commission determination reviewable in federal court to one involving the formation of an interconnection agreement, as opposed to its later interpretation and, if necessary, enforcement. The requirement that the determination to be reviewed be one made "under this section," *i.e.* under § 252, is announced in the initial clause as a necessary prerequisite to going any further. Section 252 sets out procedures only for the negotiation, arbitration and approval of agreements. Although it addresses in some detail the process of formation of interconnection agreements--including negotiation that leads to voluntary agreement, arbitration if the parties cannot agree on any issues, and the requirement that the state commission approve the agreement before it goes into effect and the grounds on which a commission may reject an agreement--that section is utterly silent regarding how, or by whom, an agreement is to be interpreted and enforced once it has gone into effect.[6] This limitation is unambiguous; a determination must be made "under" § 252, that is, made in connection with the listed procedures for formation or approval of an agreement, to qualify for federal court review under § 252(e)(6). *See Ardestani v. INS*, 502 U.S. 129, 135 (1991) ("natural" reading of "under section 554" is "subject to" or "governed by" 5 U.S.C. § 554) (internal quotations omitted).

Although no clearer limitation is necessary, other language in this provision and elsewhere in § 252 demonstrates that federal review is restricted to formation cases. The

[6] Similarly, § 251, which imposes the substantive obligation to interconnect for which the procedures in § 252 are prescribed, imposes duties to interconnect, to provide technically for interconnection to be workable and to negotiate agreements in good faith, but goes no further into the parties' relationship.

scope of federal court review provided by § 252(e)(6) is cabined in a way that applies to the contract formation and approval process but not to subsequent interpretation. Section 252(e)(6) allows federal actions only "to determine whether the agreement or statement[7] meets the requirements of section 251 and [§ 252]." Review of whether the content of an agreement complies with those requirements should occur at the time the agreement is approved. In addition, § 252(e)(4), which provides for the automatic approval of an agreement if the state commission does not approve or reject it within a specified time, adds that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." This provision indicates that Congress did, in fact, consider the possibility of state court review of state commission determinations regarding interconnection agreements, and chose to prohibit it only as to decisions "approving or rejecting" them. The specificity of this limitation suggests that Congress did not intend to preclude customary state court review of other determinations made by state commissions, including those interpreting and enforcing agreements among utilities they regulated.

The court of appeals failed to apply the proper plain-language analysis, both in the instant case and in *MCI II*; indeed, it did not even address the "axiomatic" principle, *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), that it was required to consider the statutory language first and to find it conclusive if it was plain. By failing to address the effect of the scope of § 252 on the limiting language of § 252(e)(6), the court essentially read the words "under this

[7] The "statement" referred to is a "statement of generally available terms," which carriers that were formerly components of the Bell telephone system (including Respondent Ameritech) may prepare and similarly submit for state commission approval under the subsection immediately following, § 252(f).

section" out of the statute. The closest the court came to considering any language in § 252(e)(6) was to cite its title ("Review of State commission actions") in deciding that Congress intended to make state commissions parties to suits under § 252(e)(6). *MCI II*, 222 F.2d at 337. If inclined to consider titles, though,[8] the court should have looked to the title of § 252 itself, "[p]rocedures for *negotiation, arbitration and approval of agreements*," (emphasis supplied), which also does not encompass interpretation or enforcement of those agreements. Instead of evaluating the legal effect of the plain nature of the limiting language, the court of appeals simply "decline[d] to read subsection 252(e)(6) so narrowly," and held that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission." *Id.* at 337-38.

The court of appeals ignored fundamental statutory construction principles in favor of an interpretation based on "the provisions of the [1996] Act, read as a whole," *MCI II*, 222 F.3d at 337. This approach was rejected in *Ardestani*, in which the Court held that, despite its belief that "the broad purposes" of the general legislation at issue would be served by a more expansive application of one of its provisions, such a reading was barred by specific language limiting its application to situations "under" a specific statute. 502 U.S. at 138. The Court should similarly reject the lower court's conclusion that § 252(e)(6) must provide for federal court review of state commission decisions outside of those involving the specific listed actions prescribed "under" § 252.

[8] Although titles cannot limit the plain meaning of statutory text, they can be a useful aid in resolving an ambiguity where there is one. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959).

B. State Court Review of Decisions Interpreting and Enforcing Interconnection Agreements is Consistent with the 1996 Act and with the Conduct of the Parties in This Case.

Reading 47 U.S.C. § 252(e)(6) to extend only to state commission decisions arbitrating or approving interconnection agreements properly leaves review of decisions interpreting and enforcing those agreements to state courts. This is precisely where cases involving the relationships among local telephone providers have been for decades and remain under the 1996 Act. Nothing in either the Act's design or its language suggests that, once the contracts providing for interconnection are in place and have been adjudged to conform to the Act, decisions resolving disputes over the meaning of their terms must necessarily pass through the federal courts in order to accomplish the Act's goals. Indeed, this case demonstrates that federal court review is not essential to the Act.

The Court has acknowledged that in exceptional cases even plain language will be so manifestly inconsistent with legislative intent as to require a different construction. These instances are "rare," *United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989), and the Court has set the bar high, *see Ingalls Shipbuilding*, 519 U.S. at 261 (plain language controls unless result is "so absurd or glaringly unjust" as to warrant departure); *Ron Pair Enter.*, 489 U.S. at 242 (result "demonstrably at odds with the intentions of the drafters"). Nothing in the 1996 Act approaches grounds for such a conclusion in this case. It is fully consistent with the Act's local telephone provisions to leave review of the interpretation and enforcement of contracts between carriers to state courts, even where that task involves the application of federal law. This is apparent from the Act's language as well as the design and purpose of its local telephone provisions.

Before the passage of the 1996 Act, the 1934 Act had divided responsibility for telecommunications regulation between the federal government (long-distance) and the States (local). Although it made substantial changes in local telecommunications regulation, the 1996 Act did not repeal the 1934 Act and in particular did not repeal 47 U.S.C. § 152, which codified that division of regulatory responsibility. *See Iowa Util. Bd.*, 525 U.S. at 381 n.8 ("Congress, by extending [the 1996 Act] into local competition, has removed a significant area from the States' exclusive control. Insofar as Congress has remained silent, however, § 152(b) continues to function.") And although the obligations to interconnect imposed in § 251 represent a significant departure from the monopolistic model under which local telephone service had been regulated in the past, it is equally apparent that Congress did not intend to replace all state regulatory authority, including the authority of state courts. Instead, the 1996 Act left much of the States' regulatory systems in place, including the roles of state commissions as the primary regulators of local telephone carriers. There is no reason to conclude that Congress intended to displace the function of state reviewing courts except where such displacement was provided for by specific language.

Congress exercised its Commerce Clause powers upon state regulation to varying degrees in the Act, ranging from requiring state utilities commissions to apply federal law, to requiring them to conduct inquiries on certain issues, to prescribing procedures to be followed by state (and even local) bodies, and in some areas to the complete preemption of state regulatory authority. *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 300 (4th Cir.), *petition for cert. filed*, 69 U.S.L.W. 3673 (U.S. April 5, 2001) (No. 00-1531). Under the Act itself, however, explicit preemption is required to displace state law. Section 601(c)(1) of the Act provides:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

Pub.L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (codified at note following 47 U.S.C. § 152). Accordingly, absent unequivocal language preempting a State's authority to act, Congress intended that authority to continue.

The Act's local telephone provisions contain no overt mention, much less explicit preemption, of state commission authority to interpret and enforce contracts between local telephone carriers. Similarly, the Act contains no express preemption of state laws, such as 220 ILCS 5/10-201 and 10-202, that authorize state courts to review commission rulings on those matters. That the Act *does* explicitly preempt state court review of decisions approving or rejecting contracts, *see* § 252(e)(4), demonstrates that Congress was aware of its own requirement of explicitness under the Act and knew how to satisfy it to preempt state court action. Accordingly, under the Act's own rules for displacement of state law, state court authority to review decisions other than those approving contracts has not been preempted.

Leaving the task of interpreting and enforcing interconnection agreements in the hands of state commissions and state courts of review is consistent with the goals of the Act. The change in local telephone regulation imposed by the Act involved the lifting of legal barriers to competition and the imposition on carriers of obligations designed to facilitate market entry. *Iowa Util. Bd.*, 525 U.S. at 371-72. In order to provide for market entry without requiring duplication of network facilities, Congress imposed the obligation to interconnect under § 251. The vehicle Congress chose to integrate that obligation into the relationships among carriers is the interconnection agreement provided for by § 252. These

provisions demonstrate that the goal of the Act's local telephone regulation scheme is contractual rights of access to existing networks. That objective is accomplished by the formation of agreements providing for access and the assurance that those agreements meet the requirements of federal and state law.

Once interconnection agreements are made and approved, however, the goal of the 1996 Act has been met. While interconnection agreements must be enforceable, the absence of any provision in the Act's local telephone provisions for regulatory activity beyond the process of formation and approval leaves the task of regulating the ensuing business relationships among telephone carriers to the States under their pre-existing authority. It is worth noting that interpretation cases will likely represent the great bulk of litigation regarding interconnection agreements, as an agreement need only be approved once but may be interpreted in any number of subsequent disagreements between parties. In Illinois, the task of resolving these contract disputes falls well within the statutory authority, and even the duty, of the ICC. Under the scheme of the 1934 Act, a scheme modified but not repealed by the 1996 Act, those tasks are left to the state commissions, acting in their ordinary regulatory capacity, and to state courts for review of those commission decisions.

The potential applicability of federal law–including FCC rules issued in accordance with the Act–similarly does not require that interpretation decisions be reviewed exclusively in federal court or in the "glitches" of bifurcated federal/state cases contemplated by the court of appeals in this case, Pet. App. 4a-5a. It is apparent from the Act's assignment of responsibility to state commissions that Congress deems them capable of applying, and in fact obligated to apply, federal law in connection with regulation of local telephone service. State courts are no less capable or less obligated. *See Testa v. Katt*, 330 U.S. 386, 394 (1947); 220 ILCS 5/10-

201(e)(iv)(C) (Illinois Appellate Court required to reverse decision of ICC if it violates federal constitution or laws).

This case, and especially the conduct of the parties to it, demonstrates that Petitioners' construction of the local telephone provisions of the 1996 Act is consistent with the Act's competitive objectives. Until Ameritech chose to sue in federal court, this case had been treated by the parties exclusively as a state contracts case. All of the reciprocal compensation provisions of the agreements in this case were negotiated privately, without ICC involvement. Accordingly, under § 252(a)(1), those portions were not required to comply with § 251(b) and (c), or even with pricing standards set by the ICC under § 252(d); they could only have been rejected by the ICC if they discriminated against a non-party carrier or were "not consistent with the public interest, convenience and necessity." *See* § 252(e)(2)(A) and (B). The agreements themselves also provided that to the extent issues fell outside the jurisdiction of the FCC or the ICC, they would be governed by Illinois law. Jt. App. 10a, 16a, 22a, 29a, 37a.[9]

The three complaints filed with the ICC after Ameritech stopped making reciprocal compensation payments for ISP calls invoked the ICC's general statutory authority to supervise utilities under the Illinois Public Utilities Act, 220 ILCS 5/101 *et seq.* Although they recited the prior approvals of the agreements by the ICC under the Act, the complaints alleged breaches of contracts,[10] and only one asserted that the ICC

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[9] The language invoking local law is consistent with governing law provisions in interconnection agreements used in other States as well. *See* Jt. App. 39a-51a.

[10] *See* Jt. App. 53a (TCG) ("The issue giving rise to this complaint is a simple – though important – dispute over a contract definition."); 79a (WorldCom) ("WorldCom alleges that Ameritech has violated the Agreement, the orders of the [ICC], and the [Illinois]

also had jurisdiction to enforce the contract under the Act as well as under state law. *See* Jt. App. 52a-53a, 79a, 88a, 90a and 93a-94a.[11] In its order resolving the complaints, moreover, the ICC focused on the language of the agreements themselves in determining that the parties intended ISP calls to be subject to the reciprocal compensation terms contained in those agreements. Jt. App. 112a-114a. Only thereafter did the ICC consider whether the conclusion it had reached violated any federal law or rule, including the 1934 Act (as amended by the 1996 Act) and FCC rules. Jt. App. 114a-118a. Ultimately the ICC based its determination on the specific holding that "Ameritech Illinois has violated its interconnection agreements" by failing to pay reciprocal compensation for ISP calls, Jt. App. 121a.

Like the language and design of the local telephone provisions of the Act, therefore, the conduct of the parties at the regulatory level placed this case squarely within the historic sphere of a state utilities commission exercising its general jurisdiction to adjudicate a contract dispute between telecommunications carriers. The ICC carried out its function with due regard for federal law; if they are permitted to do so, Illinois' courts will do the same. Nothing in these proceedings or in the design or language of the 1996 Act suggests that such state court review would have been inconsistent with the intention of the drafters of the 1996 Act. Absent such contradiction, the plain language of

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Public Utilities Act...."); 93a (MCI) ("Ameritech's failure to pay MCI reciprocal compensation for ISP local traffic constitutes a violation of the parties' interconnection agreement.").

[11] The complaint filed by Respondent TCG initially asserted only that it was proceeding under state law provisions, Jt. App. 52a, but later claimed that the ICC had jurisdiction to interpret and enforce interconnection agreements under both the Illinois Public Utilities Act and the federal 1996 Act, Jt. App. 57a-58a.

§ 252(e)(6) dictates that review of the ICC order in this case should be available only in the Illinois Appellate Court.

C. Section 252(e)(6) Should be Read to Confine Federal Court Review to Arbitration and Approval Decisions to Avoid the Difficult Eleventh Amendment Questions Raised By This Case.

The Court has held that "[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000); *see also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 684 (2001); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). This is a "cardinal principle" that the Court has considered to be "beyond debate." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Thus, even if 47 U.S.C. § 252(e)(6) were ambiguous, the Court should adopt the plain-language reading of it that is advanced above. Doing so will allow the Court to avoid the significant Eleventh Amendment problems posed by the second and third questions presented in this case.

As Petitioners show in Parts II and III of this argument, by adjudicating the complaints filed in this case the ICC did not waive Illinois' Eleventh Amendment immunity from suit in federal court, and that immunity could not be avoided by a suit under the doctrine of *Ex parte Young*. Regardless of whether that suit actually violated the Constitution, however, those questions raise serious constitutional concerns. The second question turns on the issue of constructive or implied waiver, as no claim of express waiver has been made and no abrogation is possible under the Commerce Clause, *Seminole*

Tribe of Florida v. Florida, 517 U.S. 44 (1996). Even assuming a State can still constructively waive immunity in connection with an exercise of Commerce Clause powers after *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), a proposition that Petitioners do not concede, predicating waiver on a State's participation in customary regulatory activity represents a grave proposition. Similar concerns are raised by the extension of individual liability under *Ex parte Young* to members of a state regulatory commission based only on a difference of opinion regarding federal law and a jurisdictional statute providing, under its broadest reading, for "review" of that commission's actions.

Issues related to the scope of the States' sovereign immunity have divided the Court in recent years, *see, e.g., Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *College Sav. Bank* ; *Alden v. Maine*, 527 U.S. 706 (1999), *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe*. The application of the Eleventh Amendment to a provision of a federal statute that the Court has already described as "not a model of clarity," *Iowa Util. Bd.*, 525 U.S. at 397, and even "surpassing strange," *id.* at 378 n.6, demonstrates that the issues presented by the remaining questions in this case are of a grave and doubtful nature. Their presence militates even further in the direction of Petitioners' plain reading of § 252(e)(6) and the avoidance of federal court review of interpretation and enforcement decisions altogether.

II. THE ICC DID NOT WAIVE ILLINOIS' SOVEREIGN IMMUNITY BY ADJUDICATING THESE COMPLAINTS.

If the Court concludes that 47 U.S.C. § 252(e)(6) permitted the district court to entertain this suit seeking review of decisions of the ICC interpreting and enforcing interconnection agreements, the Court must decide whether that suit violated the State of Illinois' sovereign immunity.[12] There has been no suggestion in this case that Illinois has expressly waived its immunity, or that Congress could abrogate it by enacting the 1996 Act as an exercise of its Commerce Clause powers, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The court of appeals erred in concluding that the ICC constructively waived Illinois' immunity by doing no more than ruling on complaints brought before it.

Waivers of sovereign immunity require an exchange of clear statements of intention from both Congress and the State in question. No such statement was made by either in connection with the 1996 Act or the ICC's proceedings in this case. Moreover, a State's waiver cannot be predicated on actions taken in the face of the threatened use of federal regulatory power. The assertion that the ICC accepted a "gratuity" or gift from Congress by deciding cases brought before it, even if under the terms of the Act, ignores the unilateral nature of the "invitation" Congress extended to the ICC, the terms of which were, essentially, "go to federal court or go home." "Waivers" inferred from conduct and extracted under the threat of the exclusion of a State from law-

[12] Petitioners believe that if § 252(e)(6) permits federal court suits seeking review of interpretation and enforcement decisions, the ICC should be a party to those suits. Petitioners acknowledge, for purposes of disposing of this question of state immunity, that as individual defendants they are an acceptable substitute for the ICC itself, which was not named as a defendant.

ful governmental activity are inherently coerced and cannot pass constitutional muster after *College Sav. Bank*.

A. Section 252(e)(6) Contains No Clear Statement of Congress' Intention That States be Subject to Suit in Federal Court.

Before a State will be deemed to have waived its sovereign immunity in connection with federal legislation, the Eleventh Amendment requires that both Congress and the State express their understanding in unambiguous terms. Thus Congress must first "manifest[ ] a clear intent to condition participation" in the program it has created on a State's consent to waive immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). The need for congressional clarity in this context is a natural application of the requirement that, whether by waiver or abrogation, legislation seeking to subject States to federal jurisdiction must address the immunity issue in plain terms. *Id.* (like abrogating legislation, that seeking waiver "likewise" must "evince an unmistakable congressional purpose"); *see also id.* at 246 ("When Congress chooses to subject a State to federal jurisdiction, it must do so specifically.") (citations omitted). Thus, the Court has required Congress to make its intention to subject a State to suit "unmistakably clear *in the language of the statute*." *Atascadero*, 473 U.S. at 242 (emphasis supplied); *see also Seminole Tribe*, 517 U.S. at 56; *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal *and textual*") (emphasis supplied).

The text of § 252(e)(6) fails that test. As discussed in Part I *supra*, that provision does not even plainly state that it covers decisions on issues beyond the agreement approval stage. More to the point, the language of § 252(e)(6) does not speak of who, other than the "aggrieved" plaintiff, would be a party to the suits it authorizes, and it certainly says nothing about either a State or its utility commission or commissioners be-

ing parties. Thus, the statute falls well short of those that have explicitly addressed Eleventh Amendment immunity issues and included States and their components as putative parties.[13]

Section 252(e)(6) also falls short when compared to statutes that, although not as explicit, have made congressional intent to subject States to federal suit "unmistakably clear" by describing the contemplated suit in terms that expressly provide for the State's involvement. *See Seminole Tribe*, 517 U.S. at 56-57 (statute made clear that State could be sued by, *inter alia,* addressing burden of proof on State and power of court to enter order against State). The most that can be said of § 252(e)(6), by contrast, is that it expressly provides district courts with jurisdiction to "determine whether the agreement or statement meets the requirements of" §§ 251 and 252. This grant of jurisdiction over a claim, without more, does not negate defenses to that claim, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 n.4 (1991), including the defense of sovereign immunity secured by the Eleventh Amendment, *Seminole Tribe*, 517 U.S. at 56. Even the court of appeals did not find congressional intent to subject States to suit in the *language* of § 252(e)(6), wherein those expressions must be found. It bypassed this require-

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[13] *Compare, e.g., College Sav. Bank*, 527 U.S. at 670 (describing the Lanham Act, which includes suable "persons" "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity" (15 U.S.C. § 1125(a)(2) and provides that they "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in federal court") (15 U.S.C. § 1122(b)); 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment... from suit in federal court for a violation of" statutes prohibiting "discrimination by recipients of Federal financial assistance"); 20 U.S.C. § 1403(a).

ment by holding that, "[a]lthough the language of the statute does not contain the express waiver language that [Petitioners] seek," the requisite intent was instead expressed in "the structure" of § 252. *MCI II*, 222 F.3d at 341. Declarations of congressional intent concealed within "statutory structure," however, do not satisfy the clear statement rule. *Dellmuth*, 491 U.S. at 232.

Given the circumstances of its passage, it is not surprising that § 252(e)(6) does not evince, expressly or otherwise, congressional intent to condition the States' involvement in local telephone regulation on waiver of their sovereign immunity. There is no dispute that, in enacting the 1996 Act, Congress was exercising its powers under the Commerce Clause. The Act was passed by Congress on February 1, 1996. Less than two months later, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and held that Congress could not abrogate Eleventh Amendment immunity under Article I of the Constitution, *Seminole Tribe*, 517 U.S. at 66, 72-73, leaving waiver as the only way a State could lose its immunity in the face of an exercise of Commerce Clause power. Thus it is unlikely that Congress had waiver in mind in enacting the Act prior to *Seminole Tribe*.

Absent any clear expression in the text of the statute itself that Congress intended to condition the States' participation in local telephone regulation on their waiver of sovereign immunity, no such waiver may be found. For that reason alone, the court of appeals' decision should be reversed.

B. The ICC Did Not Unequivocally or Voluntarily Waive Illinois' Sovereign Immunity by Lawfully Adjudicating the Complaints in This Case.

Even if clearly asked to do so by Congress, a State must independently speak with the same clarity in waiving its sovereign immunity as is required of Congress in the asking. *College Sav. Bank*, 527 U.S. at 680-81 ("There is a fundamental difference between a State's expressing *unequivocally* that it waives its immunity, and Congress's expressing *unequivocally* its intention that if the State takes certain action it shall be deemed to have waived that immunity.") (emphasis supplied). Effective waiver of sovereign immunity by a State must demonstrate "'the intentional relinquishment or abandonment of a known right or privilege.'" *Id.* at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). To be certain that a truly knowing and voluntary waiver has occurred, a State's consent to suit must be "unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("*Pennhurst II*"); *see also Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) (requiring a "clear declaration" of intent to submit to federal jurisdiction). The test for determining whether a State has consented to suit is "stringent," *Atascadero*, 473 U.S. at 241, and incorporates "every reasonable presumption against waiver," *College Sav. Bank*, 527 U.S. at 682 (citations and internal quotations omitted).

Without an explicit waiver in this case, the court of appeals relied on a finding that Illinois had "constructively waived" its sovereign immunity. The concept of constructive or implied waiver, however, did not survive the Court's decision in *College Sav. Bank*. Although the court of appeals thought *College Sav. Bank* had condemned only certain types of constructive waivers and had "endorsed" others, *MCI II*, 222 F.3d at 342, the Court has categorically rejected constructive or implied waivers by conduct. In *Edelman v. Jordan*, 415 U.S. 651(1974), the Court observed that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Id.* at 673. The Court expressed a willingness to find waiver by a State only where stated in express language or "by such overwhelming implications *from the text* as [will] leave no room

for any other reasonable construction." *Id.* (citation and internal quotation omitted) (emphasis supplied).[14]

Similarly, in *College Sav. Bank* itself the Court relied on authority involving waivers of sovereign immunity by the United States[15] and of other constitutional rights held by individuals where the possibility of implied waiver had been categorically rejected. 527 U.S. at 681-82. The Court saw "no reason why the rule should be different with respect to state sovereign immunity." *Id.* at 682. Finally, the Court observed that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers" would permit Congress to avoid the Court's holding in *Seminole Tribe* that Congress cannot abrogate state immunity in the exercise of those powers. *College Sav. Bank*, 527 U.S. at 683. Thus, in condemning "*Parden*-style waivers," *id.* at 682 (and overruling *Parden v. Terminal Ry. Co. of Alabama*, 377 U.S. 184 (1964)), the Court announced a rule of general application: that States cannot constructively or impliedly waive their sovereign immunity in any context. That rule requires reversal here.

In finding nonetheless that the ICC had constructively waived its sovereign immunity, the court of appeals relied on the treatment in *College Sav. Bank* of two other instances in which States were deemed to have waived constitutional rights. *See* 527 U.S. at 686-87 (distinguishing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) and *South Dakota v. Dole*, 483 U.S. 203 (1987)). The Court in *College Sav. Bank* found those cases "fundamentally differ-

[14] The Court in *Edelman* relied on *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909), which considered, and found inadequate to demonstrate waiver, the text of a state statute.

[15] *United States v. King*, 395 U.S. 1, 4 (1969) (waiver of sovereign immunity by United States "cannot be implied but must be unequivocally expressed.").

ent" because they involved a State's concession obtained by a congressional offer of a "gratuity" (in *Petty*, the conditional approval by Congress of an interstate compact under the Compact Clause, U.S. Const., art. I, § 10, cl. 3) or a "gift" (in *Dole*, the conditional disbursement of federal highway funds to a State under the Spending Clause, U.S. Const., art. I, § 8, cl. 1,). To shoehorn § 252(e)(6) into what it thought was left of the constructive waiver doctrine after *College Sav. Bank*, the court of appeals characterized the actions of the ICC in this case as acceptance of a clearly conditional gift or gratuity bestowed by Congress. Because Congress could have preempted the ICC from all involvement in the regulation of telecommunications activity, the court reasoned, that activity was no longer "permissible" or "lawful" for the ICC. Therefore, "inviting" it to participate was the offer of something to which it was not entitled, a gift that could be conditioned on the waiver of sovereign immunity without amounting to coercion. *MCI II*, 222 F.3d at 342-44. Whether or not *Dole* and *Petty* represent forms of waiver that have been "endorsed," *MCI II*, 222 F.3d at 342, or merely distinguished, they have no application here.

The federal power underlying the 1996 Act was not the authority to confer a "gift" or "gratuity" such as approval or funds. Rather, Congress regulated under its Commerce Clause power and its power under the Supremacy Clause to displace state laws. Congress exercised those powers to influence, to varying degrees, the States' own exercise of their pre-existing authority over local telecommunications, *see Bell Atlantic*, 240 F.3d at 300, not to offer the States any benefit. The court of appeals relied on the broad sweep of the Commerce Clause power, *MCI II*, 222 F.3d at 343, but the fact that Congress possesses preemptive power under the Commerce Clause does not relax the requirement that a State consent to waive its sovereign immunity. *Seminole Tribe*, 517 U.S. at 72 ("Even where the Constitution vests in Congress complete lawmaking authority over a particular area,

the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."); *see also FERC v. Mississippi*, 456 U.S. 742, 785-86 (1982) (O'Connor, J., dissenting) (Despite Congress' ability to preempt "the entire field of utility regulation," "[t]he Constitution permits Congress to govern only through certain channels.... [I]t is no answer that Congress could have reached the same destination by a different route"). In order to obtain a valid waiver of sovereign immunity under the Commerce Clause, then, Congress still had to obtain from the State an unequivocal and voluntary declaration of waiver.

To conclude that regulation of local telephone service by state commissions was no longer a "lawful" activity after the passage of the 1996 Act, the court of appeals essentially treated § 252 as if it had in fact preempted state regulation of local telecommunications and then "invited" the States back in. *See MCI II*, 222 F.3d at 343-44. The Act itself belies this notion. As noted *supra* p. 23, § 601(c) of the Act preserves preexisting federal and state law absent explicit preemption. Although § 252 prescribes rules and requires state commissions to apply them, it does not purport to preempt the States from exercising regulatory jurisdiction over local telecommunications. Indeed, § 252(e)(5) specifically provides that state jurisdiction is "preempt[ed]" only by FCC order and only when the state commission *fails* to act. Similarly, 47 U.S.C. § 152, which assigned regulatory jurisdiction over local telecommunications to the States as a matter of federal law, was not repealed by the Act. *See Iowa Util. Bd.*, 525 U.S. at 381 n.8.

Absent actual (and therefore explicit) preemption of state regulation, the ICC's resolution of the competing carriers' complaints was "lawful" or "otherwise permitted" activity, and waiver extracted under the threat of exclusion from that activity was "automatically" involuntary, *see College Sav. Bank*, 527 U.S. at 687. Indeed, under both federal and state

law, the ICC's proceedings in this case were required. The provisions of § 252 are not "invitations" to state commissions. They prescribe what a state commission "shall" do, *see, e.g.*, § 252(b)(4)(C) (state commission "shall resolve each issue" in arbitration); § 252(c)(1) (state commission "shall ensure that [arbitrated] resolutions and conditions meet the requirements of" § 251); § 252(e) (state commission "shall approve or reject the agreement"). Section 252(e)(5) speaks in similar terms, directing FCC preemption when a state commission "fails to act to carry out its responsibility" under § 252. These provisions reveal the real terms of the one-sided "invitation" extended by Congress: the States must incorporate federal rules and procedures into their regulation of local telecommunications and implicitly submit to suit in federal court by any "aggrieved" private party when they follow them.

Illinois law similarly bound the ICC. The provisions of the Illinois Public Utilities Act, in place well before the 1996 Act and invoked by the competing carrier Respondents in their complaints (Jt. App. 52a, 79a, 90a), require the ICC to dispose of complaints brought before it and even provide for the issuance of writs of mandamus if the ICC does not issue orders resolving the complaints within a specified time. *See* 220 ILCS 5/10-108, 10-109 and 10-110. Those state statutes, not explicitly preempted by any provision of the 1996 Act, do not allow the ICC to decline to resolve complaints for reasons unrelated to the complaints themselves, including a desire not to consent to suit in federal court. Accordingly the "invitation" from Congress to participate in local telephone regulation conditioned on willingness to waive sovereign immunity was, under both federal and state law, an offer that the ICC literally could not refuse.

In concluding that state regulation of agreements among local telephone service providers was no longer an "otherwise permissible activity" for state commissions, *MCI II*,

222 F.3d at 343, the court of appeals ignored the fact that federal regulatory power created this precondition for waiver. Petitioners' presence in federal court resulted not from a choice made and expressed by the State of Illinois, but from the unilateral action of Congress. Because they involve congressional powers to offer inducements, cases like *Petty* and *Dole* may not present the danger of coercion that arises where, as here, the "gift" may not be declined. Under the 1996 Act, however, the consequence of refusal to waive instead is "not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity." *College Sav. Bank*, 527 U.S. at 687; *see also Edelman*, 415 U.S. at 688 (Marshall, J., dissenting) (distinguishing between laws that "impose federal standards and liability upon... often-unwilling state agencies" and those that "induce" state immunity waiver by providing funds). As the *College Sav. Bank* Court feared, this type of one-sided "forced waiver" is merely abrogation by another name–"not even different sides of the same coin, [but] the same side of the same coin." *Id.* at 683.

In *College Sav. Bank*, the Court observed that:

> All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has the authority to regulate conduct. Thus, *all* federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and–to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability–can be redescribed as invitations to "waiver."

527 U.S. at 683, quoting *Union Gas*, 491 U.S. at 43 (Scalia, J., dissenting) (emphasis in original). The court of appeals in this case did just what that passage condemned: it "redescribed" a unilaterally-imposed federal prescription attached

to "conscious[ ]" ICC activity that fell within Congress' regulatory field as an "invitation to 'waiver.'" The more accurate description of that action by Congress is neither a "gift" nor a "gratuity," but an abrogation.

In evaluating the voluntariness of the ICC's purported waiver of sovereign immunity, finally, the Court should consider the character of the activity from which the ICC would be excluded under the Act absent its consent to suit in federal court. Utilities regulation is a long-standing function of state government in Illinois, and the right and power to undertake it is not a gratuity Congress offered to the State. The ICC has been regulating public utilities in Illinois for almost 90 years. Moreover, federal law has been applied in the regulation of utilities in Illinois since before the ICC was created. *See, e.g., Bhd. of R. R. Trainmen v. Terminal Ry. Ass'n.*, 379 Ill 403, 411-12 (1942); *People ex rel. Stead v. Chicago, Indianapolis & Louisville Ry. Co.*, 223 Ill. 581, 594 (1906) (predating existence of ICC). Although the Court in *College Sav. Bank* found that the distinction between inherently governmental conduct and that customarily engaged in by private parties (like operating the railroad in *Parden*) was not illuminating in that commercial-activity case, it does demonstrate in this case the gravity of offense to state sovereignty posed by § 252(e)(6). If waivers of sovereign immunity cannot be obtained by threats of exclusion of a State from the "lawful" operation of a railroad or a college savings plan, it would be anomalous to hold that they could be based on threats to restrict the operation of a State's utilities commission, even where its proceedings involved consideration of federal law. The State of Illinois should not have to choose between giving up the "vital public service" performed by the ICC and "'consenting'" to federal suit." *See Employees of the Dep't of Public Health & Welfare of Missouri v. Dep't of Health & Welfare of Missouri*, 411 U.S. 279, 296-97 (1973) (Marshall, J., concurring) (internal quotations in original).

Left undisturbed, the court of appeals' effort to apply the constructive waiver doctrine to § 252(e)(6) would carry far-reaching implications. If a State, simply by acting in an area that falls within Congress' commerce power, can be deemed to have implicitly waived its sovereign immunity as a condition of continued activity in that area, Congress can easily "circumvent the antiabrobgation holding of *Seminole Tribe*." *College Sav. Bank*, 527 U.S. at 683. *College Sav. Bank* reaffirmed the principle that a State's waiver of sovereign immunity must, like any other waiver of a constitutional right, be both unequivocally expressed by the State, 527 U.S. at 680-81, and "altogether voluntary," *id.* at 676 (*citing Beers v. Arkansas*, 61 U.S. 527 (1858) (internal quotations omitted). The court of appeals' interpretation of the 1996 Act allowed Congress to impose waiver unilaterally, under the threat of exclusion of the State from a "lawful activity," a condition that bestowed no gift; rather, it "automatically" passed the "point of coercion" and "destroyed" the voluntariness of any waiver. *College Sav. Bank*, 527 U.S. at 687. For these reasons, the decision below should be reversed.

III. THE ICC'S MEMBERS CANNOT BE SUED UNDER THE DOCTRINE OF *Ex parte Young*.

The third question on which the Court granted *certiorari* involves whether Respondents can evade Illinois' sovereign immunity by means of a suit against the individual members of the ICC under the *Ex parte Young* doctrine. The court of appeals did not address the question in this case, but it did allow the case to proceed against the ICC's individual members, Pet. App. 14a, and it answered the question in the affirmative in *MCI II*, 222 F.3d at 345-48. Contrary to the court of appeals' view, however, "[t]he situation presented here... is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 517 U.S. at 73.

Under *Ex parte Young*, 209 U.S. 123, 159-60 (1908), the Eleventh Amendment is generally not a bar to actions by private citizens in federal court to restrain state officials from committing ongoing violations of federal law. *See also Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 276-77 (1997). The *Young* doctrine has been thought necessary to ensure the supremacy of federal law, *see Green v. Mansour*, 474 U.S. 64, 68 (1985), and its continued validity is not in doubt, *see Coeur D'Alene*, 521 U.S. at 269. But "[t]he Court has also recognized... that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst II*, 465 U.S. at 105. Accordingly, the Court has been careful not to expand the doctrine in ways that "would upset the balance of federal and state interests that [*Young*] embodies." *Papasan v. Allain*, 478 U.S. 265, 277 (1986); *see also Coeur D'Alene*, 521 U.S. at 281 (*Young*-type relief may not be available where a State's "special sovereignty interests" are at stake); *Pennhurst II*, 465 U.S. at 104-06 (state officials may not be coerced under *Ex parte Young* to conform their conduct to state law); *Edelman*, 415 U.S. at 665-66 (*Young* action will not lie to vindicate past violations of federal law).

The careful balancing of state and federal interests required under the Court's *Ex parte Young* jurisprudence weighs decidedly against the doctrine's application in this case. First, there is no need to vindicate the supremacy of federal law because state commissions performing their duties under the Act do not commit "violations" of that law by deciding federal law issues within their jurisdiction. Second, by providing a specific mechanism for judicial review of state commission decisions rendered under the Act, Congress signaled its intent not to subject individual commission members to judicially-created remedies of the sort authorized under *Ex parte Young*. *See Seminole Tribe*, 517 U.S. at 73-

76. For these reasons, the Court should reverse the judgment of the court of appeals.

A. State Commissioners Do Not Lose Their Official Character by Making Errors of Federal Law Within their Jurisdiction.

Ex parte Young only applies if a state officer is alleged to be committing an ongoing violation of federal law. *Papasan*, 478 U.S. at 277-78. Members of state public utility commissions are hardly open to this charge in the present context. They cannot be said to *violate* federal law, to be acting "without the authority of... the state in its sovereign or governmental capacity," and therefore be "stripped of [their] official and representative character," *Young*, 209 U.S. at 159-60, simply by resolving disputes within their jurisdiction, even if their decisions are based on views of federal law that, upon later review, are rejected. Because Respondents cannot overcome this traditional limitation on *Young*'s application, the Court should hold the doctrine inapplicable.

The court of appeals framed the issue in this case as "whether the ICC, in determining that under the agreements the parties intended that calls to Internet service providers would be subject to reciprocal compensation, violated federal law." (Pet. App. 15a). This statement implies that the ICC and like commissions "violate federal law" when, in the course of resolving disputes within their jurisdiction, they misapply substantive federal law or rules that govern interconnection agreements. This is wrong, at least as far as the sovereign immunity question is concerned. State commissions do not violate federal law, and thereby lose their bond to the State that employs them, by exercising that jurisdiction. *See Papasan*, 478 U.S. at 277 ("In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal."). This is true even if, in the exercise of their

authority, commissions err in applying governing law. *See generally Pennhurst II*, 465 U.S. at 113 ("[A]n error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it.") (citation omitted); *Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 109-10, 96 N.E. 2d 518, 521 (1951) (ICC orders are not rendered void on the ground that they are erroneous).[16]

This result follows from *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), in which the Court barred an action for specific performance of a contract based upon the federal government's sovereign immunity, even though the named defendant was an official rather than the government agency itself. The plaintiff had named a federal agency's administrator as the defendant, but made no allegation that the administrator had acted outside his statutory authority. *Id.* at 691. Holding the action was a suit against the government even though an individual officer was the named defendant, the Court laid down the general rule:

> [T]he action of an officer of the sovereign... can be regarded as so "illegal" as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers,

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[16] There can be no dispute that the relief sought in this case is "effectively against" the ICC. The ICC acts only as a body, 220 ILCS 5/2-101 ("[E]very finding, order or decision approved by a majority of the members of the Commission shall be deemed the finding, order or decision of the Commission."), the complaint filed by Respondent Ameritech specifically sought an injunction "against enforcement of the ICC's Order," Jt. App. 145a, and even the court of appeals agreed that, in the context of an action seeking review of the ICC's determinations, its commissioners "are the Commission," Pet. App. 14a.

> or their exercise in the particular case, are constitutionally void.

Id. at 701-02. "A claim of error in the exercise of that power," the Court added, "is . . . not sufficient." *Id.* at 690.

Larson leads to the conclusion that state utilities commissioners do not violate federal law and therefore do not lose their official character when they interpret interconnection agreements, even if their interpretation contains errors of federal law. Indeed, the very action claimed to have violated federal law in *Larson* was the construction of a contract, a construction the Court assumed was wrong. *Id.* at 703. Having jurisdiction to decide the matters raised in the complaints in this case, the ICC was required to resolve them in accordance with the best judgment of the commissioners and the mandates of due process. But those commissioners cannot be sued because they render "incorrect" decisions: "We have heretofore rejected the argument that official action is invalid if based upon an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." *Larson*, 337 U.S. at 695; *see also Pennhurst II*, 465 U.S. at 112-13 & n.22.

To be sure, there are instances where state officials performing adjudicatory or quasi-adjudicatory functions are said to be in violation of federal law. *See, e.g., Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 530-33 (2000) (*per curiam*) (state court violated voters' equal protection rights by ordering manual recount of ballots without providing uniform standards for what constitutes a legal vote); *Shelley v. Kramer*, 334 U.S. 1, 20 (1948) (state court's enforcement of racially-restrictive covenant held to be in violation of the Fourteenth Amendment). But cases like these do not support the proposition that state adjudicators violate federal law whenever they misapply governing federal standards. These cases only establish that judicial officers can be state actors within the meaning of the Fourteenth Amendment, *see Kramer*, 334

U.S. at 14, a rule that stands in acknowledged tension with the fiction upon which *Young* is based, *i.e.*, that officials acting in contravention of federal law no longer act on behalf of the State for purposes of the Eleventh Amendment. *See generally Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) ("There is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be state action for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh.") (plurality opinion). The state action cases do not address the scope of a State's sovereign immunity and thus do not diminish the rule in *Larson*. Under that rule, state adjudicators cannot be said to violate federal law by resolving disputes within their lawful jurisdiction.

B. Limiting Relief to Judicial Review of State Commission Decisions Evinces Congressional Intent to Preclude *Ex parte Young* Actions.

Even if state commissions can be said to violate federal law when they perform functions assigned to them under the Act, their individual members are not amenable to suit under *Ex parte Young*. Congress envisioned one limited and commonplace safeguard against agency error: the availability of judicial review. *See* 47 U.S.C. § 252(e)(6). Under *Seminole Tribe*, 517 U.S. at 73-76, this limited remedy forecloses the availability of *Young*-type relief.

"[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily-created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. The remedial scheme supplied by § 252(e)(6) is not detailed in the sense that it is elaborate, but it "define[s]" and also "limit[s] significantly" the relief available. *See id.* In this case, of course, Ameritech brought suit not to enforce a

statutory right against Illinois, but rather to obtain some form of relief from the ICC's order. Still, the result was the same: state officers sued in federal court. The same principle of restraint should therefore apply. More specifically, just as courts should recoil from creating remedies in addition to those prescribed by Congress for the enforcement of federal rights, *see Seminole Tribe*, 517 U.S. at 74 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)), so too should they avoid creating additional or different federal review mechanisms when Congress has specifically provided one, *see, e.g., Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *Maxine Marine, Inc. v. Director, Officer of Workers' Compensation Programs*, 39 F.3d 144, 146 (7th Cir. 1994). Because Congress limited the remedy available to "aggrieved parties" under § 252(e)(6) to review of state commission decisions, and narrowed it even further to consideration of whether the agreement under consideration meets the requirements of specified federal laws, the additional remedies provided by the broad equitable powers of federal courts as applied to individual state officials should not be available.

In § 252(e)(6) Congress specifically provided for a familiar method of judicial review: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." To the extent this language at all contemplates a State's participation in review proceedings, it undoubtedly envisions participation by the state commission itself, not its individual members. *See AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 653 (5th Cir. 2001) (Smith, J., dissenting). In addition, it clearly contemplates traditional judicial review of administrative agency action, as would be available in analogous cases where review of an FCC order is sought. In those cases

the FCC is the appropriate defendant, not its individual members. *See generally* 28 U.S.C. § 2342(1); 47 U.S.C. § 402; *see also GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999) (FCC is proper defendant in review proceeding challenging its orders); *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (same). And when FCC orders are overturned, the courts do not issue injunctions against the FCC's individual members, as Ameritech sought here (Jt. App. 145a). Instead, cases are remanded to the agency, and the FCC is duty-bound to comply with the court's mandate. *See* 47 U.S.C. § 402(h); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) ("On review the court may thus correct errors of law and on remand the [FCC] is bound to act upon the correction."). Section 252(e)(6)'s language suggests no intention to depart from this scheme where review of a state commission's order is sought.

The Act thus contemplates nothing more than straightforward judicial review of state commission decisions. *See Bell Atlantic*, 240 F.3d at 295 ("The limit of the stated interest [under section 252(e)(6)] is the 'review' of certain State commission decisions."). There is no text-based evidence that Congress meant to supplement this mechanism by authorizing district courts to enjoin state commission members in contravention of the States' sovereign immunity. *Cf.* 5 U.S.C. § 702 (specifically waiving federal government's immunity from actions for injunctions against federal officers). To the contrary, it is doubtful that Congress, assuming it has in fact entrusted state commissions with the task of resolving disputes over the meaning of federally-mandated interconnection agreements, wanted commissioners to be hauled into federal court to answer for their alleged errors in applying federal law. As the Fourth Circuit explained in *Bell Atlantic*:

> To bring these State officers before a federal court to answer to the assertion of a private citizen that in acting within the scope of their authority they made the wrong decision would be an affront to the sovereignty of the State . . . and would undermine the mutual respect that characterizes the relationship between the federal and State sovereigns.

240 F.3d at 298.

The court of appeals rejected this argument on the ground that the Act does not explicitly limit the relief district courts may award when reviewing agency action under section 252(e)(6). *MCI II*, 222 F.3d at 347. The statute's silence on available remedies, however, cannot be construed as a congressional *imprimatur* on any kind of remedy that might be devised to enforce judgments under § 252(e)(6). No one doubts the district court's ability to enforce its judgments by injunction against persons who are proper parties to the court's proceedings. *See AT&T Communications*, 238 F.3d at 653 n.20 (Smith, J., dissenting). It is quite another matter, however, to say that state commission *members*—who are not mentioned in the text of § 252(e)(6), as proper parties or otherwise—may be named as defendants and thereby "expose[d]... to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Seminole Tribe*, 517 U.S. at 75. *Young* actions against the individual members of the ICC in the present context would "supplement" the scheme created by Congress "with one created by the judiciary." *Seminole Tribe*, 517 U.S. at 74. As the Court has made clear, it is for Congress and not the courts to choose which remedies are sufficient for the enforcement of statutory rights. *See id.* at 75-76. To allow this action to proceed under a *Young* theory would contradict the intent of Congress as reflected in the specific remedial scheme described in § 252(e)(6).

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX –
TITLE 47, UNITED STATES CODE § 251

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty–

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 [, 47 U.S.C.].

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC].

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 [, 47 U.S.C.].

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 [, 47 U.S.C.] the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network–

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [, 47 U.S.C.].

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [, 47 U.S.C.]. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty–

(A) to offer for resale at wholesale rates any telecommunications service that the carrier

provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the [FCC] under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], the [FCC] shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3), the [FCC] shall consider, at a minimum, whether–

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that–

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part [47 U.S.C. §251 *et seq.*].

(e) Numbering administration

(1) Commission authority and jurisdiction

The [FCC] shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The [FCC] shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the [FCC] from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC].

(3) Universal emergency telephone number

The [FCC] and any agency or entity to which the [FCC] has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In

making the designation, the [FCC] (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of enactment of the Wireless Communications and Public Safety Act of 1999 [Oct. 26, 1999].

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [, 47 U.S.C.] (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State

commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [, 47 U.S.C.] (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with [FCC] regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996].

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c)

to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services

for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996] under any court order, consent decree, or regulation, order, or policy of the [FCC], until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC] after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the [FCC].

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that–

(A) on the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the [FCC]'s regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The [FCC] may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if–

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the [FCC]'s authority under section 201[, 47 U.S.C.].

TITLE 47, UNITED STATES CODE § 252

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251[, 47 U.S.C.], an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 [, 47 U.S.C.]. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning–

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes

within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate

with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 [, 47 U.S.C.], including the regulations prescribed by the [FCC] pursuant to section 251 [, 47 U.S.C.];

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 [, 47 U.S.C.], and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section–

(A) shall be–

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [, 47 U.S.C.], a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless–

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed–

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the [FCC] or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) [, 47 U.S.C.], a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to

the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251 [, 47 U.S.C.], including the regulations prescribed by the [FCC] pursuant to section 251 [, 47 U.S.C.], or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 [, 47 U.S.C.], nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC]'s actions shall be the exclusive remedies for a State commission's failure to act. In any case in

which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [, 47 U.S.C.] and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 [, 47 U.S.C.] and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 [, 47 U.S.C.] and the regulations thereunder. Except as provided in section 253 [, 47 U.S.C.], nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 [, 47 U.S.C.].

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this Act [47 U.S.C. §151 *et seq.*], a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 [, 47 U.S.C.], and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act [47 U.S.C. §151 *et seq.*].

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved

under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) [, 47 U.S.C.].

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IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

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RULE 29.6 STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.), and MCImetro Access Transmission Services LLC are all wholly owned subsidiaries, directly or indirectly, of WorldCom, Inc. WorldCom, Inc. is a Georgia corporation that, through its wholly owned subsidiaries, provides local, long distance, and other telecommunications services domestically and internationally. WorldCom, Inc. is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT." WorldCom, Inc. has no parent corporations. No publicly held company owns 10 percent or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Focal Communications Corp. states as follows:

Focal Communications Corporation, through its operating subsidiaries, provides local exchange telecommunications services, including telecommunications services to Internet service providers. Focal Communications Corporation is a Delaware corporation that is publicly traded on the NASDAQ National Market under the symbol "FCOM." No publicly held company owns 10 percent or more of the stock of Focal Communications Corporation. There are no subsidiaries or affiliates of Focal Communications Corporation that have issued equity or debt securities to the public.

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IN THE

Supreme Court of the United States

No. 00-878

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

Respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, Inc. (together, "WorldCom"), and Focal Communications Corporation (collectively, "Competitors"), through undersigned counsel, submit this brief in support of the decision of the United States Court of Appeals for the Seventh Circuit in *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), Pet. App. 6a-22a, *amended*, Order, No. 98-3150 (7th Cir. Aug. 19, 2000), Pet. App. 3a-5a. As we show, the Seventh Circuit correctly

held that federal courts have jurisdiction and authority to entertain federal law challenges to state commission determinations enforcing pre-existing interconnection agreements between competing local carriers.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6) to review the determination of the Illinois Commerce Commission ("ICC") for compliance with federal law.

The judgment of the court of appeals was entered June 18, 1999, and amended August 9, 1999. The petition for rehearing was denied on August 9, 2000. By order of a single Justice of this Court, Petitioners' time for filing a petition for a writ of certiorari was extended to November 28, 2000. The petition was filed on November 28, 2000, and was granted on March 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") filed this action in federal court against the Commissioners of the ICC ("ICC Commissioners") and several Competitors, challenging the ICC's March 11, 1998, Order enforcing various "interconnection agreements" that the Competitors and Ameritech had executed under the Telecommunications Act of 1996 ("1996 Act" or "Act"), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et*

seq.[1] Ameritech's complaint alleged, *inter alia*, that the ICC's Order violates the Act and applicable regulations of the Federal Communications Commission ("FCC"). The ICC Commissioners contend that those federal claims fall outside the statutory jurisdiction of the district court and, in any event, are excluded from adjudication in federal court by the Eleventh Amendment.

1. The Statutory Scheme

The 1996 Act fundamentally changed the regulation of the local telephone industry throughout the country. In the Communications Act of 1934, Congress left regulation of intrastate telecommunications primarily to the states. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The states, in turn, historically granted exclusive franchises to incumbent local telephone companies like Ameritech. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); H.R. Rep. No. 104-204, at 49 (1995).

Congress enacted the 1996 Act for the express purpose of ending this monopoly regime and promoting a competitive market for local telephone service. *See AT&T Corp.*, 525 U.S. at 371. Toward that end, the 1996 Act partially supplants state regulation and imposes a new set of substantive federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *Id.* at 371-73. Congress thus altered the prior balance of federal and

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[1] In addition to Ameritech's interconnection agreements with WorldCom and Focal, this case concerns agreements between Ameritech and respondents Teleport Communications Group, Inc. and AT&T Communications of Illinois, Inc., which are separately represented here.

state regulatory authority in the area of local telecommunications. *Id.* at 371.

Under the Act, a new entrant that wishes to enter a local telephone market must contact the incumbent carrier to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If the two carriers cannot reach an agreement, they must ask the governing state commission to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). The results of the negotiation and arbitration process are memorialized in an "interconnection agreement" between the carriers, which is then submitted for approval to the state commission. *Id.* § 252(e).

Although the Act supplies minimum requirements that state commissions must follow in arbitrating provisions about which the parties cannot reach a negotiated agreement, parties may negotiate terms "without regard" to these requirements. *Id.* § 252(a)(1). When parties voluntarily agree to terms, a state commission may reject the terms only if they are discriminatory or against the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A); *see also AT&T Corp.*, 525 U.S. at 371-73.

Thus, in the spirit of cooperative federalism, Congress vested the FCC with the primary authority to implement the federal standards created by the Act, *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. §§ 201(b), 251(d)(1), while at the same time, carving out a new, voluntary role for states in overseeing interconnection agreements. The Act in no way requires state commissions to help implement the new federal scheme. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6); *see also AT&T Corp.*, 525 U.S. at 378 n.6 ("there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel"). If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *See* 28 U.S.C. § 2342(1).

2. Nature of the Dispute

This case concerns one aspect of the parties' interconnection agreements, "reciprocal compensation," which is the payment that a local carrier receives for completing a call for another local carrier. With local competition, customers of one local carrier will call customers of another. Carriers must therefore assist each other in delivering calls. When a customer of one local carrier makes a call to a customer of another local carrier, only the caller pays its carrier for the telephone services, leaving the other carrier uncompensated. The caller's local carrier therefore must compensate the other carrier whose facilities are used to complete the call. *See* 47 U.S.C. § 251(b)(5); Pet. App. 8a-9a.

The parties to this case agreed in their interconnection agreements to pay reciprocal compensation for the exchange of "Local traffic." Local traffic is defined in the parties'

interconnection agreements as a call of less than fifteen miles to another local telephone number. Pet. App. 18a; JA 8a, 14a, 38a. The dispute in this case was whether calls by local customers of one carrier that are routed by another carrier to its local customers operating as "Internet Service Providers" ("ISPs") constitute "Local traffic" under the interconnection agreements. These calls were treated for purposes of billing customers like any other local call. Pet. App. 18a-19a; JA 113a-114a, 117a. Ameritech and the Competitors also routinely charged each other reciprocal compensation for delivering ISP calls placed by each others' customers. JA 118a-119a.

In July 1997, however, Ameritech announced that it was unilaterally stopping reciprocal compensation payments for calls to local ISPs, claiming for the first time that such calls are not "Local Traffic." Pet. App. 9a. In response, the Competitors asked the ICC to enforce the agreements by requiring Ameritech to resume payments of reciprocal compensation for ISP calls. *Id.* at 9a-10a. The ICC held an evidentiary hearing on November 21, 1997. JA 98a-99a. On March 11, 1998, the ICC ruled that the plain language of the agreements, industry custom and practice, and Ameritech's own conduct mandated payment of reciprocal compensation for calls to ISPs. Pet. App. 10a; JA 112a-119a.[2/]

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[2] The FCC has long struggled with whether the Act requires reciprocal compensation for calls to ISPs. It first held that the Act does not require, or prohibit, such payments. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 (1999), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). At WorldCom's request, the D.C. Circuit vacated that order for want of reasoned decision making. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (continued...)

3. The District Court Proceedings

On March 27, 1998, Ameritech filed suit in the United States District Court for the Northern District of Illinois against the Competitors and the ICC Commissioners, in their official capacities, to challenge the ICC's determination.[3/] Ameritech sought declaratory and injunctive relief under 47 U.S.C. § 252(e)(6), 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201 and 2202. JA 126a-127a. Three of the five counts of Ameritech's complaint alleged continuing violations of federal law. JA at 139a-145a. Those counts alleged that the ICC's determination violates the express requirements of sections 251(b)(5), 252(d)(2) and 251(g) of the 1996 Act (Count IV); that the ICC's determination violates the 1996 Act in that the Act assigns regulatory authority over interstate communications such as calls to ISPs to the FCC (Count III); and that the ICC's determination is contrary to binding FCC regulations which purportedly characterized calls to ISPs as "exchange access"

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[2] (...continued)
(D.C. Cir. 2000). The FCC recently has (1) concluded that the Act does not require reciprocal compensation for these calls, (2) established prospectively a new federal compensation regime for this traffic, and (3) determined that its new order does not affect preexisting contract obligations or state commission decisions like those at issue in this case. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. Apr. 27, 2001). Numerous parties have appealed that decision to the D.C. Circuit, *WorldCom, Inc v. FCC*, No. 01-1218.

[3] At the same time it filed in the District Court, Ameritech filed a parallel action in the Illinois Appellate Court. The Illinois Appellate Court stayed that action at Ameritech's request pending resolution of this case. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, No. 3-98-0393, Order Granting Stay (Ill. App. Ct. June 17, 1998).

not subject to reciprocal compensation requirements (Count II). JA 140a-143a. Ameritech also claimed that the ICC's determination violates Illinois law (Count V), JA 144a-145a, and the terms of the interconnection agreements themselves (Count I), JA 139a-140a.

After briefing by the parties, the District Court rejected the ICC Commissioners' arguments that the court lacked jurisdiction and that the ICC Commissioners were immune from suit under the Eleventh Amendment. Pet. App. 26a-30a. The court also ruled against Ameritech on the merits, holding that the ICC's interpretation of the agreements did not violate federal law. JA 173a-180a.

4. The Seventh Circuit's Decision

Ameritech and the ICC Commissioners appealed to the Seventh Circuit. The Court of Appeals rejected the Commissioners' Eleventh Amendment arguments based on its prior decision in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir.) ("*MCI-I*") *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000) ("*MCI-II*"), *cert. denied*, 121 S. Ct. 896 (2001). Pet. App. 1a-2a, 12a-13a. In *MCI-I*, which involved ICC determinations *approving* interconnection agreements, the Seventh Circuit had held that the Commissioners had waived any Eleventh Amendment immunity by voluntarily accepting Congress's invitation to participate in the implementation of interconnection agreements under the 1996 Act. 168 F.3d at 322. According to the court, "Congress gave states a genuine choice: The states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court; or the states could retain their sovereign immunity and allow the FCC to carry out

the federal regulatory functions without their participation." *Id.*

Having rejected the Eleventh Amendment arguments based on *MCI-I*, the Seventh Circuit in this case likewise rejected the Commissioners' contention that the court lacked subject matter jurisdiction over Ameritech's complaint because section 252(e)(6) of the Act did not provide for judicial review of commission determinations enforcing, as opposed to approving or rejecting, an interconnection agreement. Pet. App. 14a-15a ("Congress envisioned suits reviewing 'actions' by state commissions" for compliance with sections 251 and 252 of the Act).

But the Seventh Circuit also determined that a federal court's scope of review under section 252(e)(6) is limited. Because the plain text of section 252(e)(6) confines review to the question of compliance with sections 251 and 252, a court's task under section 252(e)(6) is "to examine the [state commission's] order, not to determine whether the [commission] correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation." *Id.* at 17a-18a. Thus, the Seventh Circuit explained, section 252(e)(6) provided no basis for the court to "review [the ICC's] actions for compliance with state law." *Id.* at 15a. Accordingly, the Seventh Circuit found that Ameritech's appeal presented a "narrow issue on the merits: whether a decision of the [ICC] regarding reciprocal compensation for telephone connections to [ISPs] violates federal law." *Id.* at 7a. Reviewing the Act and the relevant FCC orders, the Seventh Circuit concluded that "nothing in what the ICC said violates federal law in existence at this time." *Id.* at 22a.

Both Ameritech and the ICC Commissioners filed rehearing petitions. The ICC Commissioners raised essentially the same issues it raises here. Ameritech argued that the Seventh Circuit erroneously circumscribed federal court review, leaving Ameritech without a vehicle to challenge the state commission's contract analysis. In an initial response to Ameritech's petition, the Seventh Circuit amended its decision on August 19, 1999. It added language stating that "[s]ection 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision 'interpreting' an agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* at 4a-5a.

The rehearing petitions were then held in abeyance for approximately one year, pending the Seventh Circuit's reconsideration of its Eleventh Amendment ruling in *MCI-I*. During that year, *MCI-I*, on rehearing, was consolidated with new appeals from Wisconsin challenging state commission approval and enforcement determinations. The Seventh Circuit ultimately issued a revised opinion, *MCI-II*, which reaffirmed the court's ruling that state commissions do not have Eleventh Amendment immunity in actions brought under section 252. In that new opinion, the Seventh Circuit relied not only on waiver but also on *Ex parte Young*. It explained that suits against state commissioners challenging approval or enforcement of interconnection agreements as violative of federal law are "straightforward *Ex parte Young* cases." *MCI-II*, 222 F.3d at 345. This is so, according to the court, because such suits do no more than seek prospective injunctive and declaratory relief against state officials to prevent their continuing violation of federal law. *Id.* The court then distinguished cases under the 1996 Act from this Court's

decisions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), on the ground that *Ex parte Young* actions under the 1996 Act do not improperly expand limited remedies made available by Congress and do not divest the States of any "special sovereignty interest" that might justify a federal court's refusal to enforce the 1996 Act. *MCI-II*, 222 F.3d at 345-48.

As for waiver, the *MCI-II* court held that "Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at 341. The Seventh Circuit also distinguished this Court's recent decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), on the ground that the 1996 Act did not extract the type of "*Parden*-style" constructive waiver that this Court rejected in *College Savings*. To the contrary, the opportunity to participate in the administration of the 1996 Act was a "gratuity" from Congress that was clearly conditioned on a state commission's submission to suit in federal court. *MCI-II*, 222 F.3d at 342-44. Having freely accepted the benefit, the state commission must also accept the condition and submit to review of its determination under the 1996 Act in federal court. *Id.* at 344.

After the new *MCI-II* decision was handed down, the Seventh Circuit denied rehearing in this case on August 9, 2000. Pet. App. 2a. This Court denied review of *MCI-II* on January 22, 2001, prior to the ruling of the Fourth Circuit in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 297 (4th Cir. 2001), *cert. granted sub nom. Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 121 S. Ct. 2548 (2001), which

created the first conflict among the circuits over the questions presented here. It later granted review in the instant case soon after the Fourth Circuit ruling. Subsequently, the Court granted review of two petitions challenging the Fourth Circuit's ruling, limited to the single question of whether a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. *See Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 121 S. Ct. 2548 (2001) ("*Verizon*").

SUMMARY OF THE ARGUMENT

The first question presented is whether a state commission action enforcing an interconnection agreement is "a determination under section 252" reviewable in federal court under section 252(e)(6). As the Fifth, Seventh, Eighth, and Tenth Circuits have agreed, the answer to that question is yes. The language and structure of section 252 indicate that Congress included section 252(e)(6) in order to make unequivocal that federal courts would play a role in reviewing the actions of state commissions that choose to participate in the new federal scheme. Section 252(e)(6) can and should be construed to accomplish that purpose with respect to all state commission "determinations," including enforcement decisions.

The Court should not assume, however, that section 252(e)(6) is the only source of federal jurisdiction to review enforcement actions for compliance with federal law. It is not. Even if section 252(e)(6) were inapplicable, general federal question jurisdiction would exist under 28 U.S.C. § 1331 to address claims that state officials have violated the 1996 Act in enforcement determinations. In this case,

Ameritech has raised a series of claims to the effect that federal law controls over state requirements. While the courts below found – correctly, in our view – that Ameritech's federal claims lacked merit, the courts nonetheless had the power to consider them under section 1331 as well as section 252(e)(6). The ICC Commissioners take too narrow a view of the federal courts' role to enforce the 1996 Act.

On the other hand, Ameritech takes too broad a view of federal jurisdiction. Nothing in the 1996 Act suggests that Congress intended to federalize the contract law question whether a state commission has correctly interpreted an interconnection agreement. The 1996 Act is replete with anti-preemption provisions and savings clauses expressly preserving state law. The question whether a state commission has correctly interpreted a contract thus arises under state law, as each circuit court to have expressly considered the question has agreed.

The Seventh Circuit's holding that the ICC Commissioners are not immune from suit here also should be affirmed for two independent reasons. First, consistent with the well-settled doctrine of *Ex parte Young*, 209 U.S. 123 (1908), the 1996 Act permits aggrieved parties to seek review of state commission determinations in federal court. Here, Ameritech brought suit in federal court for prospective injunctive and declaratory relief to stop the Commissioners' alleged ongoing violations of federal law – precisely the type of action that *Ex parte Young* permits. Moreover, that the alleged violations of federal law occurred in a formal decision issued by the ICC, and that judicial review would also have been available in state court, in no way undermine the applicability of *Ex parte Young*.

By its terms, the 1996 Act imposes no limits on the equitable powers that federal courts have at their disposal to ensure that state commissioners' actions comply with the Act's requirements. Thus, an *Ex parte Young* suit does not expand the remedy that Congress provided in the 1996 Act. To the contrary, the remedies available under each are perfectly coterminous. It follows that this Court's admonition in *Seminole Tribe* – that courts must not allow suits under *Ex parte Young* to eviscerate detailed and limited remedial schemes prescribed by Congress – has no application here.

Although the analysis can stop there, the Commission defendants also consented to federal court jurisdiction and thereby waived any Eleventh Amendment immunity by voluntarily choosing to participate in the administration of the 1996 Act. In the spirit of cooperative federalism, Congress offered states the benefit of participating in the administration of the Act. It lay solely within Congress's discretion whether to offer states that opportunity; administration of a new *federal* Act is not an otherwise permissible activity for a state. Further, each state is free to decline any role in administering the Act if it so chooses. Accordingly, the ICC Commissioner's participation in the administration of the Act is a benefit or "gratuity" that can be conditioned on waiver of Eleventh Amendment immunity under this Court's decision in *College Savings*.

ARGUMENT

I. FEDERAL COURTS HAVE JURISDICTION TO DETERMINE WHETHER STATE COMMISSION "ENFORCEMENT" DETERMINATIONS VIOLATE THE 1996 ACT.

The first question presented is "[w]hether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a 'determination under [section 252]' and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6)." The short answer to that question is yes. A state commission action enforcing an interconnection agreement is "a determination under section 252" and is reviewable in federal court under section 252(e)(6).

We respectfully submit, however, that the Court's inquiry should more properly begin with the general grant of federal question jurisdiction in 28 U.S.C. § 1331. The question, as we see it, should be whether anything in section 252 suffices to *withdraw* federal question jurisdiction as to this one category of federal claims. When the question is reformulated in this manner, the answer becomes very clear. There is no language in section 252(e)(6) – or any other portion of the 1996 Act – even hinting at a congressional intent to *bar* federal jurisdiction over claims that state commission enforcement determinations have violated the Act.

A. Ameritech Raised Federal Questions That Federal Courts Have Jurisdiction to Answer under 28 U.S.C. § 1331.

The ICC and its supporting *amici* proceed from the false assumption that the existence of federal jurisdiction to review claims that state officials violated federal law in enforcement decisions turns on whether those decisions are "determinations under section 252" within the meaning of section 252(e)(6). *See, e.g.*, Pet. Br. 17-18; Br. of New Jersey *et al.* as *Amici Curiae*, at 1-2 ("N.J. Br."); Br. of *Amicus Curiae* Nat'l Ass'n of Reg. Util. Comm'rs, *et al.*, at 9-17 ("NARUC Br."); Br. of Council of State Gov'ts, *et al.* as *Amici Curiae*, at 5-6 ("Council Br."). Regardless of how the Court rules on that issue, the district court plainly had jurisdiction to consider Ameritech's federal claims. A civil action "arises under" federal law for purposes of section 1331 when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997).

To determine whether it has federal question jurisdiction, the court "must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Ameritech's complaint easily satisfies this requirement. Three counts in that complaint – Counts II, III, and IV – directly allege a federal violation. In Count II, Ameritech alleged that "The ICC Order Is Contrary To Controlling FCC Orders." JA 140a. In Count III, Ameritech alleged that "The ICC's Order Violates Controlling

Federal Law, Which Assigns Authority Over Interstate Communications To The FCC." JA 141a. In Count IV, Ameritech alleged that "The ICC Order Violates Sections 251(b)(5), 252(d)(2) and 251(g) of the 1996 Act." JA 142a. Each of these Counts requires the court to consider federal law as an "essential element" of Ameritech's claims. Jurisdiction therefore exists under section 1331. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction [under section 1331] over suits to enjoin state officials from interfering with federal rights").

Of course, federal statutory challenges to state commission enforcement determinations as contrary to federal law need not be *meritorious* in order to fall within the jurisdiction of the federal courts. Here, for example, the district court and the Seventh Circuit properly concluded that nothing in the Act or relevant FCC regulations bars the ICC from enforcing agreements to pay reciprocal compensation on calls to ISPs. But "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. at 682; *accord Jackson Transit Auth. v. Local Div. 1285*, 457 U.S. 15, 21 n.6 (1982). The "absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (emphasis in original). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to

involve a federal controversy." *Id.* (internal quotations and citations omitted).[4]

In sum, the district court plainly had jurisdiction over this case under section 1331, unless section 252(e)(6) somehow withdraws that jurisdiction. As we show next, no such withdrawal has occurred.

B. Section 252(e)(6) Does Not Withdraw the District Court's General Federal Question Jurisdiction.

Section 252(e)(6) does not preclude a federal court from exercising general federal-question jurisdiction in cases challenging state commission enforcement actions. First, though clearly a grant of power to the federal courts, it is far from clear that section 252(e)(6) addresses what this Court has referred to as "genuine subject matter jurisdiction." *See Steel Co.*, 523 U.S. at 90-91 (even statutes referring to "jurisdiction" frequently do not relate to "genuine subject-matter jurisdiction"). It states:

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[4] The Fourth Circuit failed to heed this critical distinction in the only court of appeals rulings finding a lack of federal jurisdiction over enforcement actions. *See Bell Atlantic Md., Inc.*, 240 F.3d at 297; *BellSouth Telecomms., Inc. v. North Carolina Utils. Comm'n*, 240 F.3d 270 (4th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3740 (U.S. May 14, 2001) (No. 00-1699). There, as here, the plaintiffs were incumbent carriers claiming that state commissions had violated federal law in orders requiring reciprocal compensation for calls to ISPs under interconnection agreements. Under the current state of federal law, the Fourth Circuit could not conceive how such a claim could have merit. *See, e.g, Bell Atlantic*, 240 F.3d at 295-97, 307-08. We agree with the Fourth Circuit that the claims had no merit, but the fact remains that the incumbents were raising non-frivolous claims requiring the court to construe federal law. We also address these issues in our brief filed contemporaneously in *Verizon*.

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251 and this section [252].

47 U.S.C. § 252(e)(6). The section does not mention "jurisdiction," and its language is just as consistent with the conclusion that Congress was simply confirming the existence of a cause of action to challenge state commission actions under the Act. *See Steel Co.*, 523 U.S. at 90-91.

Second, assuming that section 252(e)(6) does relate to the district court's subject matter jurisdiction, it cannot be construed as withdrawing preexisting jurisdiction in enforcement cases. The crux of the argument pressed by the ICC Commissioners and their supporting *amici* concerning the meaning of section 252(e)(6) is that it has *nothing whatsoever* to do with enforcement of interconnection agreements. Observing that section 252(e)(6) relates to State commission determinations "under" section 252, Petitioners argue that "[s]ection 252 sets out procedures only for the negotiation, arbitration and approval of agreements. . . . [T]hat section is *utterly silent* regarding how, or by whom, an agreement is to be interpreted and enforced once it has gone into effect." Pet. Br. 18 (emphasis added).[5]

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[5] *See also id.* at 23 ("The Act's local telephone provisions contain no overt mention . . . of state commission authority to interpret and enforce contracts between local telephone carriers"); NARUC Br. 12-13 ("A close look at § 252 suggests that the caption of the section, which states only that it covers 'Procedures for negotiation, arbitration, and approval of agreements,' is true to the text. The only State 'determinations' authorized

(continued...)

We disagree with this interpretation of section 252(e)(6), because enforcement determinations by state commissions are made "under" section 252. *See infra* Section I.C. But assuming that our interpretation were wrong and the ICC Commissioners' were correct, then section 252(e)(6) would be – in Petitioners' own words – "utterly silent" concerning jurisdiction to review enforcement determinations. Thus, on Petitioners' own view of the case, section 252 could not affect section 1331 jurisdiction to review enforcement determinations.[6] *See, e.g.*, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673-76 (1986) (statute that expressly provides for judicial review in one class of cases does not eliminate section 1331 jurisdiction in another class of cases as to which it is silent) (superseded by statute on other grounds, when Congress amended 42 U.S.C. § 1395ff(b) (1988)).[7]

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[5] (...continued)
deal specifically with arbitration and approval of arbitrated agreements. State enforcement authority is not mentioned") (footnote omitted); N.J. Br. 5-6 ("There is no express provision in the Act providing for the state commissions to enforce or otherwise resolve disputes between the parties to a previously approved agreement").

[6] Similarly, if section 252(e)(6) relates to a cause of action rather than to subject matter jurisdiction, either it gives carriers a cause of action for review of state commission enforcement determinations, or it is altogether silent concerning enforcement. In the latter case, the section would not constitute a detailed remedial scheme for enforcement that could displace a private right of action under 42 U.S.C. § 1983 or the inherent equitable authority of the federal courts to issue injunctions to enforce federal rights.

[7] *See also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 16 (2000) (explaining that *Michigan Academy* held that "statute's total silence" about judicial review in one class of cases "meant that, although review was not available *under § 405(g)*, the silence did not (continued...)

Third, the Act itself makes clear that it cannot be construed to limit the general reach of section 1331 by implication. Section 601 provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal . . . law unless *expressly* so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c)(1) (emphasis added), *reprinted at* 47 U.S.C. § 152 note. Congress knows how *expressly* to limit the reach of section 1331, having done so elsewhere in the U.S. Code. *See, e.g.*, 42 U.S.C. § 405(h) ("[n]o action . . . shall be brought under section 1331 . . . of Title 28 to recover on any claim arising under this subchapter"). Plainly, section 252(e)(6) does not expressly limit the preexisting jurisdiction of the federal courts under section 1331.[8]

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[7] (...continued)
itself foreclose other forms of review, say review in a court action brought under § 1331") (emphasis added); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493-94 (1991) (holding that statute that expressly limits jurisdiction of federal courts with regard to specific type of case will not be construed as impairing section 1331's general grant of federal question jurisdiction with respect to closely related proceedings); *cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105-06 (1868) (holding that repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction heretofore allowed"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (holding same).

[8] Relying on section 601(c)'s preservation of *state* law, the Fourth Circuit concluded that Congress intended to leave review of enforcement decisions to state courts and preclude federal jurisdiction. *See Bell Atlantic*, 240 F.3d at 300-01, 303, 306. But the Fourth Circuit's analysis inexplicably ignores the fact that section 601(c) preserves both *federal and state* law, unless expressly superseded by the Act. With respect to enforcement cases, the Act expressly supersedes neither federal court jurisdiction under section 1331 nor state court jurisdiction under applicable state law. Again, we also address these issues in our brief filed (continued...)

Fourth, when Congress intended the Act to limit some court's subject matter jurisdiction, it did so clearly and unambiguously. Thus, the Act expressly provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). Given that example of an express exclusion of jurisdiction elsewhere in the same section of the Act, the only fair conclusion is that in *enforcement* cases Congress was content to allow litigants the choice between state and federal court for pursuit of their federal claims.

C. A State Commission Enforcement Decision Is a "Determination" under Section 252.

In addition to section 1331, section 252(e)(6), assuming it speaks to jurisdiction, provides a second basis for jurisdiction here. The Fifth, Eighth, and Tenth Circuits have all agreed with the Seventh Circuit that the "determinations" reviewable under section 252(e)(6) include actions enforcing existing interconnection agreements. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla. Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 480-81 (5th Cir. 2000). As the Tenth Circuit persuasively explained, "[s]ection 252(e)(6) grants federal jurisdiction in *'any case'* in which a state commission makes a 'determination' under this section. When a state commission, after approving an agreement pursuant to the authority granted by the Act, subsequently issues another decision interpreting the terms of the agreement, this is also a

[1] (...continued)
contemporaneously in *Verizon*.

'determination' pursuant to its authority under § 252." *Brooks Fiber*, 235 F.3d at 497 (emphasis added). The only dissenting circuit is the Fourth, which misconstrued the statute for the reasons stated herein and in WorldCom's brief in *Verizon*.

The ICC Commissioners and their supporting *amici* focus on two aspects of the language of section 252(e)(6). First, they argue that the ICC's action was not "under" section 252 because that section assertedly deals only with approval or rejection, not enforcement, of interconnection agreements. *See e.g.*, Pet. Br. 16-20. But the ICC already has admitted that its determination was made "under" section 252. Its own Order stated: "[t]his Commission's jurisdiction under [state law] and Section 252 of the Telecommunications Act of 1996 . . . to interpret and enforce the terms of interconnection agreements is not disputed." JA 112a. Indeed, the ICC cited the Eighth Circuit's pronouncement that

> the state commissions' plenary authority [under sections 251 and 252] to accept or reject [interconnection] agreements necessarily carries with it authority to enforce the provisions of the agreements that the state commissions have approved.

Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (1997), *vacated in relevant part as unripe sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) (cited by ICC Order, JA 112a, 121a).

This understanding of the scope of section 252 is undoubtedly correct in light of Congress' other uses of the phrase "under this section" in section 252. Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission *in approving or rejecting an*

agreement under this section." 47 U.S.C. § 252(e)(4) (emphasis added). If state commission action "under this section [252]" encompassed nothing more than approving or rejecting an agreement – as the ICC Commissioners contend – then Congress' insertion of the words "approving or rejecting an agreement" before "under this section" would be entirely redundant in section 252(e)(4). In that event, Congress simply could have said "[n]o State court shall have jurisdiction to review the action of a State commission [ ] under this section." But it did not. Congress' deliberate inclusion of the limiting phrase "approving or rejecting an agreement" in section 252(e)(4), and its deliberate omission of those words in section 252(e)(6), can only be understood as a recognition that section 252(e)(6) refers to matters going beyond approval and rejection decisions.

Similarly, section 252(e)(5) provides that "[i]f a State commission fails to act or carry out its responsibility *under this section* in any proceeding or other matter *under this section* . . . the [FCC] . . . shall assume the responsibility of the State commission *under this section* with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5) (emphasis added). If state commission responsibilities "under this section [252]" did not include both approval *and* enforcement actions, there would be no authorization for the FCC to step in and resolve disputes over enforcement of interconnection agreements in the event a state commission chose not to do so.

The FCC has interpreted section 252(e)(5) to encompass enforcement determinations in a case in which the Virginia Corporation Commission chose not to interpret and enforce a previously approved interconnection agreement. *See In re Starpower Communications, LLC, Petition for Preemption of*

Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 15 F.C.C.R. 11277, ¶¶ 1-6 (2000) ("*Starpower*"). The FCC reasoned:

> In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' "responsibility" *under section 252.* We conclude that *it is*.

Id.¶ 6 (emphasis added). The FCC expressly incorporated the Seventh and Fifth Circuit's reasoning on this point, finding that "inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements." *Id.* ¶6 & n.13 (citing *Illinois Bell*, 179 F.3d 566, and *Southwestern Bell*, 208 F.3d 475). Congress expressly delegated to the FCC authority to make rules with the force of law implementing all provisions of the 1996 Act, *see* 47 U.S.C. § 201(b); *AT&T Corp.*, 525 U.S. at 377-85, and the FCC's interpretation of the Act is therefore entitled to *Chevron* deference from this Court, *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172-73 (2001).[9]

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[9] In interpreting section 252(e)(6) to apply only to state commission approval decisions, the Fourth Circuit recognized that its holding could conflict with the FCC's ruling in *Starpower* but suggested that a state commission's "responsibility under this section" in section 252(e)(5) may be different than a state commission "determination under this section" in section 252(e)(6). *See Bell Atlantic*, 240 F.3d at 303 n.6. There is no basis for refusing to defer to the FCC's conclusion that the phrase "under this section" should have the same meaning in both subsections.

In sum, there is ample basis in the language of the statute to conclude that Congress understood enforcement determinations to be "under" section 252. Any other reading would mean that in the event a state commission chose not to handle an enforcement dispute, the matter might have to be resolved in the first instance, not by the FCC under section 252(e)(5), but by a court, which is unlikely to be what Congress had in mind.[10/]

Petitioners also rely on the language in section 252(e)(6) providing that federal courts should determine whether the "agreement . . . meets the requirements of section 251 [and section 252]." Petitioners argue that review of *agreements* occurs at the time of approval, not enforcement. Pet. Br. 19. But the fact that the statute refers to review of agreements for compliance with the Act does not exclude treatment of enforcement actions as "determinations" reviewable under section 252(e)(6). Rather, this language simply reflects the nature of the legal issues presented when state commission enforcement actions are challenged as violating the Act. For example, in the course of enforcing an arbitrated agreement, a state commission could adopt an interpretation of the agreement that a party thinks is inconsistent with the Act. Or the commission might *refuse* to enforce a negotiated agreement based on a perceived inconsistency with the Act. As in these examples, any enforcement determination that allegedly violates the Act necessarily raises the question whether the

[10] Petitioners seek to support a contrary conclusion by citing *Ardestani v. INS*, 502 U.S. 129, 132-39 (1991), which dealt with a provision limiting application of the Equal Access to Justice Act to cases brought "under" section 554 of the Administrative Procedure Act. In that case, however, the deportation proceedings at issue had been *expressly* excluded from the scope of section 554 and the petitioner was asking the Court to overlook that express exclusion. Nothing of the sort applies to this case.

interconnection "agreement" itself – as negotiated by the parties and/or arbitrated, interpreted, and enforced by the state commission – "meets the requirements of" the Act.

The ICC Commissioners also argue that jurisdictional statutes must be "strictly construed." Pet. Br. 17; *see also* NARUC Br. 12 & n.15. The cases they cite do not state a rule of construction, however, much less one that would require every arguably ambiguous statute to be construed against jurisdiction. Rather, the cases stand for the proposition that the federal courts may not expand their jurisdiction beyond what Congress has provided by statute. Once Congress's intent has been determined *using ordinary means of statutory construction*, the jurisdiction created by Congress under the statute as construed "is not to be expanded by judicial decree," *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994).[11/] Thus, like any other statute, a jurisdictional statute must be construed to make sense and to comport with the structure and purpose of the statute as a whole. *See, e.g.*, *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275-76 (1996).

Accepting a construction of section 252(e)(6) that precludes federal court jurisdiction to review enforcement decisions "would yield an incoherent jurisdictional scheme," and the Court should "hesitate to attribute such a design to Congress." *Id.* The 1996 Act creates a "new federal regime"

[11] The decision on which Petitioners place primary reliance, *Stone v. INS*, 514 U.S. 386 (1995), is a case in point. There the Court employed ordinary rules of statutory construction to interpret a jurisdictional statute whose meaning was not clear on its face. *Id.* at 390-405. Having construed the statute, the Court held that it must adhere to the jurisdictional limits set by Congress and could not expand federal court jurisdiction through judge-made doctrines like "equitable tolling." *Id.* at 405.

that "fundamentally restructures local telephone markets." *AT&T Corp.*, 525 U.S. at 371, 378 n.6. Federal court review of state commission decisions ensures that federal courts can develop a uniform federal interpretation of the Act's substantive provisions. As this Court has emphasized in discussing the Act: "[I]f the federal courts believe a state commission is not regulating in accordance with federal policy *they may bring it to heel*." *Id.* at 378 n.6 (emphasis added).

It would have made no sense for Congress to have provided that federal courts have *exclusive* jurisdiction to review state commission orders approving interconnection agreements, *see* 47 U.S.C. § 252(e)(4) (ousting state court jurisdiction in approval cases), while simultaneously precluding federal courts from entertaining challenges to enforcement determinations as violative of the Act. That would mean that the power of the federal courts to resolve a given issue of federal law would turn entirely on whether a party happened to have the foresight and desire to raise it at the approval stage. Congress cannot have intended to set up a scheme of judicial review so dependent on arbitrary timing.

In sum, although section 252(e)(6) is not needed to establish federal jurisdiction over claims that state commission enforcement decisions violate the Act, the best reading of the statute authorizes, rather than excludes, federal court review in enforcement cases.

D. The 1996 Act Does Not Support Ameritech's View of the Complete "Federalization" of Interconnection Agreement Disputes.

For all the foregoing reasons, federal courts have jurisdiction – whether under section 252(e)(6) or section 1331

– to hear non-frivolous claims that state officials have violated the Act. Under either section, however, that jurisdiction extends only to questions arising under federal, not state, law.[12] Recognizing that limitation, Ameritech has sought to "federalize" every aspect of state commission enforcement determinations, including the question whether the commission correctly *interpreted* an agreement. Indeed, Ameritech filed a separate petition for certiorari seeking review of this question. *Illinois Bell Tel. Co. v. WorldCom Techs., Inc., petition for cert. filed*, 69 U.S.L.W. 3410 (U.S. Nov. 28, 2000) (No. 00-921).

The Court need not address this issue in order to answer the questions on which it granted review. Moreover, every circuit that has addressed the issue agrees that whether a state commission has incorrectly interpreted an interconnection agreement is a state law question. *Bell Atlantic Md., Inc.*, 240 F.3d at 308; *Brooks Fiber*, 235 F.3d at 497-99; *Southwestern Bell*, 208 F.3d at 480. Nonetheless, we will briefly address Ameritech's view, in anticipation that Ameritech will suggest that the issue is intertwined with the questions presented.

Contrary to Ameritech's view, questions of contract interpretation are not federalized merely because Congress required the contract by statute. *Jackson Transit*, 457 U.S. at 22-23. In *Jackson*, a union argued, much as Ameritech does

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[12] Moreover, the Eleventh Amendment prevents a district court from asserting supplemental jurisdiction over state law claims under 47 U.S.C. § 1367 in suits against a state commission or its members in their official capacity unless the state consents to suit, because the doctrine of *Ex parte Young* does not apply to state law claims, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 103-21 (1984), and nothing in the Act indicates that Congress conditioned state participation on waiver of immunity with respect to state law claims.

here, that collective bargaining agreements were governed by federal law because a federal statute required local governments to execute those agreements. *Id.* at 20-21. This Court disagreed, holding that the interpretation of contractual terms raises a question of federal law only if the statute at issue demonstrates that Congress intended that "the rights and duties contained in [such a] contract be federal in nature." *Id.* at 23.

Ameritech nonetheless suggests that federal courts should fashion a federal common law of interconnection agreement interpretation. But federal courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Only in a "few and restricted" cases, "where there is a significant conflict between some federal policy or interest and the use of state law" should a court contemplate creating federal common law. *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotations and citations omitted). Instead, when dealing with a comprehensive federal statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Nothing in the Act suggests that Congress intended to transform every contract interpretation issue arising from an interconnection agreement into a federal claim, particularly because many interconnection agreement provisions have nothing to do with the Act's requirements. In fact, section 252(a)(1) provides that parties may "enter into a binding agreement . . . *without regard* to the standards set forth in" the Act. 47 U.S.C. § 252(a)(1). Had Congress intended negotiated agreements – such as each of the agreements at issue here – to be governed exclusively by federal law, it would not

have allowed parties to enter into them "without regard" to the Act's requirements.[13]

Further, Congress provided that "[t]his Act . . . shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c), *reprinted at* 47 U.S.C. § 152 note. It also provided that states may impose state law requirements in interconnection agreements and that pro-competitive state law requirements that do not conflict with the Act are not preempted. 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c); *see also* Conf. Rep. 104-458, at 126-27 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 137. These provisions foreclose an argument that interconnection agreements are wholly federalized and should be interpreted according to federal common law principles.[14]

Finally, Ameritech has argued that the Seventh Circuit's position on the scope of federal jurisdiction means that parties

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[13] Nor may Ameritech claim that enforcement actions are inherently federalized because it has a "right" under section 252(a) to a "binding" interconnection agreement. Merely because parties disagree about the meaning of a provision does not mean the agreement is not binding. Congress's statement in section 252(a) that interconnection agreements are "binding" simply means that parties are bound to perform under their agreement, as interpreted by a court or agency, and are not free to disavow or repudiate their obligations. In a case like this, no party has disavowed its interconnection agreement obligations; rather, the parties have a disagreement over what those obligations are.

[14] On this point, the ICC Commissioners are largely correct that states retain an important role in regulating local telecommunications. *See* Pet. Br. 21-27; 47 U.S.C. §§ 252(e)(3), 253(b). The ICC Commissioners simply push their argument too far in asserting that federal courts may play no role in vindicating federal rights in enforcement actions.

may have to file state claims in state court and federal claims in federal court. But that need occur only in cases where the defendant state commission chooses to assert Eleventh Amendment immunity to bar the federal court from considering state-law claims that would fall within the court's supplemental jurisdiction under 28 U.S.C. § 1367. *See Brooks Fiber*, 235 F.3d at 498. Where that occurs, the bifurcation is the result of the state's choice to invoke the Eleventh Amendment – not some flaw in the statutory scheme. As this Court recognized in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), bifurcated review of federal and state issues may be inefficient, but it is sometimes a necessary consequence of the Eleventh Amendment. 465 U.S. at 121-23.

E. The Court Should Not Misinterpret the Statute to Avoid a Purported Constitutional Issue That Is Neither Serious Nor Difficult.

There is no merit to Petitioners' argument that the Act should be interpreted to preclude federal court jurisdiction to adjudicate federal questions in order to avoid a serious constitutional question under the Eleventh Amendment. As we show in the next section, there is no grave threat of constitutional infirmity here, because this is a straightforward *Ex parte Young* case. Even if the analysis under *Ex parte Young* were less clear, due respect for Congress would preclude use of the doctrine of constitutional doubt to create jurisdictional "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that . . . will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional." *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998). There is no possibility – much less a serious likelihood – that statutes permitting federal courts to

entertain suits for prospective relief against ongoing violations of federal law by state officials could be held unconstitutional.[15]

II. *EX PARTE YOUNG* PERMITS THIS SUIT.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the rule of *Ex parte Young*, a doctrine meant to ensure the supremacy of federal law, *see Green v. Mansour*, 474 U.S. 64, 68 (1985), a suit in federal court against state officials seeking prospective relief from ongoing violations of federal law is not treated as implicating a state's immunity under the Eleventh Amendment. *See Coeur d'Alene*, 521 U.S. at 281 (opinion of the Court); *id.* at 294 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting); *see also Pennhurst*, 465 U.S. at 102 (citing *Ex parte Young*, 209 U.S. at 160).

Although the ICC Commissioners argue otherwise, Pet Br. 40-48, these requirements are plainly satisfied here. Significantly, neither the Commissioners nor their supporting *amici* contest that Ameritech's complaint sought only prospective relief. JA 125a-145a. They similarly do not deny

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[15] The doctrine of constitutional doubt cannot be applied here for an additional reason: "the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled." *Almendarez-Torres*, 523 U.S. at 238; *see also, e.g., Salinas v. United States*, 522 U.S. 52, 59-60 (1997); *Seminole Tribe*, 517 U.S. at 57 n.9. Even assuming that, after the complexities of section 252(e)(6) have been unraveled, the Act could fairly be read as utterly inapplicable to enforcement cases, there would still be no possible interpretation of section 252(e)(6) that would actually withdraw the federal question jurisdiction conferred by section 1331.

that the effects of the Commissioners' determination is ongoing. *See MCI-II*, 222 F.3d at 345 (the "challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine"). Nor do Petitioners or their supporting *amici* contest the fact that Ameritech's complaint alleged ongoing violations of *federal* law.[16] JA 140a-143a.

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[16] Only the Fourth Circuit has reasoned that the elements of an *Ex parte Young* action are not met in the enforcement context because a carrier's complaint does not arise under federal law but, rather, arises under the interconnection agreement itself and, therefore, under state contract law. *See Bell Atlantic Maryland, Inc.*, 240 F.3d 279; *BellSouth Telecomms.*, 240 F.3d 270. That reasoning is flawed and no party adopts it here. In that case, the Fourth Circuit acknowledged that Bell Atlantic's complaint alleged that the state commission's determinations violated both federal and state law. It concluded that Bell Atlantic's federal claims lacked merit, however, and that its only potentially meritorious claims were its state contract law claims based on the terms of the interconnection agreement. *Bell Atlantic*, 240 F.3d at 295-97. Accordingly, the court held that Bell Atlantic's complaint could not be maintained under *Ex parte Young* because it did not arise under federal law and, therefore, the state interest outweighed any federal interest in the matter. *Id.* at 297-98. But the rule of *Ex parte Young* does not require that the allegations arising under federal law be meritorious. If it did, courts would be required to pre-judge and rule on the merits of the plaintiff's federal causes of action before determining whether the court had jurisdiction to do so. Instead, this Court has made clear that *Ex parte Young* requires only that the plaintiff *allege* a non-frivolous violation of federal law. *See Coeur d'Alene*, 521 U.S. at 281 ("An *allegation* of an ongoing violation of federal law . . . is ordinarily sufficient") (emphasis added); *Papasan v. Allain*, 478 U.S. 265, 281-83 (1986) (first determining whether plaintiff *alleged* ongoing violations of federal law, and *then* addressing whether those allegations warranted relief on their merits); *see also Bell Atlantic*, 240 F.3d at 317 n.9 (King, J., dissenting).

Instead, Petitioners argue that they cannot be accused of having *violated* federal law by having erroneously *applied* it. Pet. Br. at 42-45. That argument has no basis in this Court's *Ex parte Young* jurisprudence. Petitioners rely primarily on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), for the proposition that government officials do not lose sovereign immunity where they have been given the authority to apply the law but have done so incorrectly. In *Larson*, a private corporation brought suit in federal court against a *federal* official – the Administrator of the federal War Assets Administration – alleging that the official had breached the Administration's contract with the corporation by failing to make a delivery thereunder. *Id.* at 685-86. The Court ruled that the federal official's erroneous interpretation of federal common law was not sufficient to strip him of sovereign immunity. *Id.* However, the Court expressly distinguished the case before it from cases such as *Ex parte Young* where a *state* official is alleged to have violated federal law and, therefore, is deemed to be acting under an unconstitutional grant of power. *Id.* at 690-91 (citing *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing *Ex parte Young*)).

Larson has no applicability here, where *state* officials are alleged to be violating *federal* law. Indeed, the ICC Defendants' reliance on *Larson* ignores the fundamental Supremacy Clause concerns that underlie *Ex parte Young*. *See Green*, 474 U.S. at 68 ("*Ex parte Young* gives life to the Supremacy Clause" and is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law"). The power of federal courts to enforce the Supremacy Clause under *Ex parte Young* does not turn on whether state officials purport to be acting *pursuant to* state rather than federal law, but on the fact that they are *state* rather than federal *officials* and their actions are *contrary to federal law*. As the Court explained in

Pennhurst, "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold *state officials* responsible to 'the supreme authority of the United States.'" 465 U.S. at 105 (emphasis added) (quoting *Ex parte Young*, 209 U.S. at 160). *See also New York v. United States*, 505 U.S. 144, 179 (1992) ("the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply").

The dual sovereignty that characterizes our constitutional order draws a fundamental distinction between state and federal officials. *See, e.g., Printz v. United States*, 521 U.S. 898, 918-22 (1997). Federal executive officials are subject to the ultimate control of the President, who heads one of the co-equal branches of the federal government and is accountable to the Nation. *See id.* at 922-23. If Congress believes that control by the President is insufficient to ensure that federal officials comply with federal law, Congress can waive sovereign immunity to permit federal court review of the lawfulness of executive action, as it has done in the Administrative Procedure Act. *See* 5 U.S.C. § 702. Thus, the Supremacy Clause concerns that underlie *Ex parte Young* are altogether absent in such a *Larson*-type situation.[17]

[17] Similarly, Supremacy Clause concerns are absent in the situation addressed by *Pennhurst*, which the ICC Defendants also cite for the proposition that *Ex parte Young* does not apply when government officials are acting within the scope of their authority. *Pennhurst* addressed the availability of "injunctive relief against state officials on the basis of *state* law." 465 U.S. at 91 (emphasis added). Not surprisingly, the Court held that "[i]n such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials (continued...)

In contrast, State officials are accountable to the people of their respective states, not the federal executive. *See Printz*, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens"). Further, except in narrow circumstances, Congress cannot abrogate the Eleventh Amendment immunity of the states to ensure that state officials comply with federal law. *See Seminole Tribe*, 517 U.S. at 55-73. Nor can Congress subject an unwilling State to suit in its own courts. *Alden*, 527 U.S. at 730-54. That leaves states free to shield their officials from judicial enforcement of federal law – *unless Ex parte Young applies*. It is for that very reason that the Court in *Alden* stressed that *Ex parte Young* is an "essential . . . part of our sovereign immunity doctrine." *Id.* at 748.

The need for *Ex parte Young* to vindicate the Supremacy Clause is not diminished where, as here, state officials take action pursuant to a federal law that they are authorized to carry out, but do so in a way that violates that federal law. When they are administering federal law, state officials remain the agents of an independent sovereign outside the direct control of the federal executive and federal courts, except insofar as *Ex parte Young* applies. The Supremacy Clause is not concerned with the legal source of a state officials' power to make policy decisions – such as those governing interconnection agreements – but "turns on the actual content of [the state official's] policy and its real effect on federal rights." *Livadas v. Bradshaw*, 512

[17] (...continued)
on the basis of state law, whether prospective or retroactive, *does not vindicate the supreme authority of federal law*." *Id.* at 106 (emphasis added); *see also Papasan*, 478 U.S. at 277 (1986) ("In such a case, federal supremacy is not implicated because the state official is acting contrary to state law only").

U.S. 107, 119 (1994).[18] Thus, in *Edelman v. Jordan*, this Court applied *Ex parte Young* to the policies pursued by state officials under a "federal-state program" which – like arbitration and approval of interconnection agreements under the 1996 Act – was largely administered by state officials within parameters set by federal law. *See* 415 U.S. 651, 653-54, 671-73 (1974); *see also Quern v. Jordan*, 440 U.S. 332, 346-49 (1979) (affirming prospective relief in sequel case to *Edelman*).

In sum, the fact that the ICC Commissioners were alleged to have violated federal law in the course of administering a federal regulatory program does not undermine the applicability of *Ex parte Young*. To the contrary, this is a "straightforward *Ex parte Young* case." *MCI-II*, 222 F.3d at 345.[19]

Petitioners next rely on *Seminole Tribe*, where the Court held that the inclusion in a statute of an express and very limited set of judicial remedies against the state impliedly precluded reliance on *Ex parte Young*. Pet. Br. 45-48 (citing *Seminole Tribe*, 517 U.S. at 74). But there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the

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[18] *Livadas* addressed the question whether a policy pursued by a state official was preempted by the National Labor Relations Act. The Supremacy Clause is, of course, the foundation for such preemption claims.

[19] *AT&T Communications v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 647 (5th Cir. 2001) (same); *MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939 (10th Cir. 2000) (same), *cert. denied*, 121 S. Ct. 1167 (2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.) (same), *cert. denied*, 531 U.S. 816 (2000).

requirements of section[s] 251" and 252. 47 U.S.C. § 252(e)(6). That is precisely what *Ex parte Young* permits: a "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (describing contours of *Ex parte Young*). Section 252(e)(6) of the Act thus raises none of the concerns present in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part.[20] *Id.* at 75. For example,

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[20] This Court described the intricacies and limited nature of the judicial review provisions under the IGRA, as follows:

> A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. § 2710(d)(7)(B)(ii). If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7)(B)(iv). The mediator chooses from between the two proposed compacts the one "which best comports with the terms of [the Act] and any other applicable Federal law and with the findings and order of the court," *ibid.*, and submits it to the State and the Indian tribe, § 2710(d)(7)(B)(v). If the State

(continued...)

although the IGRA authorized federal courts to order a state to negotiate in good faith, it barred enforcement of those orders. *Id.* at 74-75. Thus, the Court in *Seminole Tribe* saw a clear *inconsistency* between the limited remedies available against the state under the IGRA and an *Ex parte Young* action, where the typical remedy is an enforceable injunction.

Nothing in section 252 limits federal court review in a remotely comparable manner. In fact, allowing *Ex parte Young* suits to proceed pursuant to section 252(e)(6) furthers Congress's intent to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).[21]

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[20] (...continued)
consents to the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." § 2710(d)(7)(B)(vi). If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary [of the Interior]" and that the Secretary "shall prescribe . . . procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction. § 2710(d)(7)(B)(vii).
517 U.S. at 50.

[21] Amici NARUC, *et al.*, attempt to liken the IGRA's detailed and limited judicial review provisions to the 1996 Act by comparing the IGRA's *judicial review* provisions with the 1996 Act's procedures for *arbitrating interconnection agreements* before state commissions. NARUC Br. 22-23. That is an apples-to-oranges comparison. The only relevant comparison is between the IGRA's judicial review scheme and the 1996 Act's judicial
(continued...)

Seminole Tribe also held that the IGRA specifically requires that "the State" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the State" for purposes of carrying out the State's duties under the IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the State." Petitioners' argument to the contrary is simply incorrect. *See* Pet. Br. at 46-48; *see also* Br. of NARUC at 23-24. Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230-31 (1908) ("a bill against the commission to restrain the members from enforcing [an order] will not be bad . . . as a suit against a State, and will be the proper form of remedy") (citing *Ex parte Young* among other cases); *cf.* 5 U.S.C. § 702 (waiving immunity from injunctive relief against federal agencies *and officials of federal agencies* in suits seeking review of agency action). Moreover, the term "state commission" is expressly defined in the Act to

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[21] (...continued)
review provision, section 252(e)(6), which provides for review of state commission actions for compliance with federal law without limitation as to remedy.

include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. 47 U.S.C. § 153(41). Contrary to the claims of Petitioners and their supporting *amici*, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.[22] The Act's authorization of suits against state commissions thus applies with equal force to suits against state commissioners, whether directly under section 252(e)(6) or under 28 U.S.C. § 1983. Accordingly, an *Ex parte Young* action against state commissioners in their official capacities would not "'supplement' the scheme created by Congress." Pet. Br. 48. To the contrary, it would effectuate it. *See Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring) (explaining that fact that suit names numerous public officials does not remove it from the scope of permissible *Ex parte Young* actions).[23]

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[22] *Seminole Tribe's* limitation on *Ex parte Young* suits applies only where Congress has enacted a limited remedial scheme for the enforcement of statutory rights "against a State." *Seminole Tribe*, 517 U.S. at 74. If this Court were to find that the 1996 Act does not expressly provide a remedy *against a State*, then, by its own terms, *Seminole Tribe's* limitation on the remedies available in an *Ex parte Young* action would not apply.

[23] Petitioners cite the Fourth Circuit's assertion that, absent a text-based evidence that Congress intended to authorize suits against individual state commissioners, such suits "would be an affront to the sovereignty of the State . . . and would undermine the mutual respect that characterizes the relationship between the federal and State sovereigns." Pet. Br. 47-48 (quoting *Bell Atlantic Maryland*, 240 F.3d at 279). But the Act expressly authorizes federal review of state commission determinations and defines "State commission" to include the individual state commissioners thereof. *See* 47 U.S.C. § 153(41). Moreover, the Fourth Circuit adopted a balancing approach to *Ex parte Young* that this Court has expressly rejected. *Compare* (continued...)

In addition to Petitioners' arguments, their supporting *amici* raise a litany of meritless arguments. NARUC, for example, mistakenly relies on *Coeur d'Alene* for the proposition that Ameritech's suit against the Commissioners would unlawfully encroach on core matters of state sovereignty. NARUC Br. 24-25. In *Coeur d'Alene*, which was expressly limited to its facts, 521 U.S. at 287, this Court held that the *Ex parte Young* suit brought there could not proceed because it was in essence a quiet title action that would "bar the State's principal officers from exercising their governmental authority over the disputed lands and waters" and "would diminish, even extinguish, the State's control over a vast reach of lands and waters." 521 U.S. at 282. This suit, by contrast, is to enforce the statutory mandates of the 1996 Act, by which (as to matters covered by the Act such as interconnection agreements among competitors) Congress "unquestionably" "has taken regulation of local competition away from the States." *AT&T Corp.*, 525 U.S. at 378 n.6. Moreover, what Congress took away from the states in the 1996 Act – regulatory authority over a small slice of intrastate telecommunications – is not an inviolable core of state sovereignty like the authority over a state's lands and waters but, rather, was ceded to the states by Congress in the Communications Act of 1934. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). This case does not remotely implicate the unique sovereignty interests at issue in *Coeur d'Alene*.

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[23] (...continued)
240 F.3d at 295-96 *with Coeur d'Alene*, 521 U.S. at 295-96 (O'Connor, J., concurring), *and id.* at 298-99 (Souter, J., dissenting). And it applied that balancing test by anticipating the merits of the case, rather than just examining the allegations of the complaint as the doctrine requires. *See Coeur d'Alene*, 521 U.S. at 294-96 (O'Connor, J., concurring); *id.* at 312-13 (Souter, J., dissenting).

Several *amici* also argue that resort to *Ex parte Young* should not be permitted here because it is not "necessary" in that the parties' could have challenged the ICC's decision in state court. N.J. Br. 29; Council Br. 28; Br. of *Amicus Curiae* Pa. Pub. Utils. Comm'n 14-16 ("Pa. PUC Br.").[24] That argument was flatly rejected by a majority of this Court in *Coeur d'Alene*. *See* 521 U.S. at 291-93 (O'Connor, J., concurring); *id.* at 312-17 (Souter, J., dissenting). The availability of relief under *Ex parte Young* in no way depends on the absence of available state remedies.[25]

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[24] Similarly, a number of *amici* contend that resort to *Ex parte Young* is inappropriate because this case is "an ordinary administrative appeal" from a state agency and thus belongs in state court. N.J. Br. 27; Council Br. 21; Pa. PUC Br. 4. But *Ex parte Young* is the traditional mechanism for federal court review of *any* state commission order that violates federal law, ordinary or not. *See Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (rejecting challenge by state public service commissioners to federal judicial review of commission orders "in view of the many cases prior to and following *Ex parte Young* . . . in which this Court has granted such relief over the same objection"); *Prentis*, 211 U.S. at 230-31. Moreover, this is far from an ordinary state administrative appeal. With the 1996 Act, Congress radically altered the balance of state authority over the local telecommunications industry by imposing uniform national standards and policies, H.R. Conf. Rep. No. 104-458, at 1 (1996), and by vesting the federal courts with jurisdiction over state commission determinations. *See AT&T Corp.*, 525 U.S. at 378 n.6. The latter action clearly was viewed as necessary to assure a consistent implementation of this important new federal statutory scheme.

[25] Finally, the Council of State Governments and other *amici* contend that the injunctive relief sought by Ameritech is barred by the Anti-Injunction Act and *Younger* abstention. Council Br. 19-28. But the Anti-Injunction Act does not apply to lawsuits authorized by Congress. 28 U.S.C. § 2283. Here, resort to federal court is expressly authorized by § 252(e)(6) and 42 U.S.C. § 1983. More fundamentally, the Anti-Injunction (continued...)

In sum, there is no reason to doubt that *Ex parte Young* is fully applicable here.

III. THE ICC WAIVED ANY ELEVENTH AMENDMENT IMMUNITY BY ACCEPTING THE BENEFIT OF ADMINISTERING THE ACT.

Although the Court need not reach the question, the Eleventh Amendment also would not bar the instant proceedings because the ICC waived any Eleventh Amendment immunity by voluntarily assuming a role in administering the 1996 Act – an opportunity that Congress conditioned upon subsequent federal court review. Contrary to the arguments of Petitioners and their supporting *amici*, this Court's recent decision in *College Savings* does not foreclose the possibility that a state may waive its Eleventh Amendment immunity without an express statement to that effect. Indeed, *College Savings* stands for just the opposite proposition. Moreover, the

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[25] (...continued)
Act prohibits only injunctions to "stay proceedings in a State court." 28 U.S.C. § 2283. The injunctive relief sought by Ameritech would run against the ICC Commissioners, not a state court.

Younger abstention is equally inapposite. As a judicially crafted doctrine of comity it, too, is inapplicable where Congress has expressly provided for federal lawsuits. Moreover, while the ICC Defendants' *violation* of federal law remains ongoing, the *proceedings* before the ICC have terminated. JA 96a-124a. This Court has never applied *Younger* abstention to *completed* proceedings of an agency. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 369 n.4 (1989). To do so would effectively impose a revolutionary requirement that parties exhaust all state court remedies before challenging state administrative determinations in federal court. *But see Edwards v. Balisok*, 520 U.S. 641, 649 (1997) (citing a long line of cases holding that "§ 1983 contains no judicially imposed exhaustion requirement").

opportunity to participate in the administration of the 1996 Act is a good example the kind of "gratuity" that the *College Savings* Court said could be validly conditioned by Congress on a waiver of Eleventh Amendment immunity.

A. *College Savings* Reaffirms that States Voluntarily Waive Eleventh Amendment Immunity by Accepting a Federal Benefit Clearly Conditioned on Such Waiver.

Eleventh Amendment immunity is waived by a state's consent to suit. *College Savings*, 527 U.S. at 675-76. In *College Savings*, this Court clarified the conditions that must be satisfied to guarantee that such a waiver is "voluntary" and "unequivocal" when it is effected through the state's acceptance of a federal benefit. *Id.* The Court held that Congress cannot make consent a precondition for a state to engage in an "otherwise permissible activity," because exclusion of a state from such an activity is a "sanction" that "coerces" a state into consenting to suit. *Id.* at 687. Thus, "the voluntariness of waiver [is] destroyed – when what is attached to the refusal to waive is the exclusion of the state from otherwise lawful activity." *Id.* For the same reason, engaging in "otherwise permissible activity" cannot be an unequivocal expression of a state's intent to waive its immunity. *Id.* at 681-83 (overruling *Parden v. Terminal Ry. Co. of Alabama State Docks Dep't*, 377 U.S. 184 (1964)).[26]

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[26] Waiver of sovereign immunity, like waiver of individual constitutional rights, is effective if it is an "intentional relinquishment or abandonment of a known right or privilege." *College Savings*, 527 U.S. at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). As the Court recognized in *College Savings*, waiver need not be *express* in order to be *intentional*. *See id.* at 678-81.

By contrast, a state's consent to suit is voluntary, and not coerced, when Congress seeks such consent by offering a benefit instead of by threatening a sanction. *Id.* at 686-87. Thus, Congress may validly require a state to consent to suit as a precondition for accepting a benefit, which *College Savings* called a "gratuity." *Id.* One example of a "gratuity" is money offered by Congress pursuant to its Article I Spending Clause powers. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)). Another is Congress's approval of an interstate compact. *Id.* (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)). Like disbursement of federal funds, Congress's approval of an interstate compact is a benefit because "States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.*

Thus, Congress may offer states benefits in exchange for their waiver of Eleventh Amendment immunity, and when states accept the benefit the waiver occurs. Indeed, in a companion case to *College Savings*, this Court reiterated that, "subject to constitutional limitations, . . . the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." *Alden*, 527 U.S. at 755 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

B. Congress Properly Conditioned State Participation in the Act on Waiver of a State's Eleventh Amendment Immunity.

The Seventh Circuit was correct that the invitation for states to participate in the implementation of the Act is the kind of benefit that Congress may condition on waiver of Eleventh Amendment immunity. Participation in the administration of the 1996 Act is an opportunity that Congress could choose to

grant or withhold at its pleasure, and the states are free to accept or decline the benefit of that participation.

Under the Act, the substantive law applicable to interconnection between telecommunications carriers was substantially "federalized," regardless of whether a state chooses to participate in the administration of those federal requirements. Congress, acting pursuant to its authority under the Commerce Clause to regulate entry into local telephone markets, *see Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91 (1981), "has taken the regulation of local telecommunications competition away from the states . . . [w]ith regard to the matters addressed by the 1996 Act," *AT&T Corp.*, 525 U.S. at 378 n.6.

It follows that administration of the Act's scheme is not an "otherwise permissible activity" in which a state could engage without Congress' permission. Rather, that administration is a benefit conferred upon a state by Congress. As the Tenth Circuit reasoned:

> [W]ith the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in *Petty* and *Dole*, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.

MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah, 216 F.3d 929, 938 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001); *see MCI-II*, 222 F.3d at 343-44 ("Congress could – and

did – take over regulation of a part of the telecommunications industry in accordance with its Commerce Power. Such regulation is no longer an 'otherwise permissible activity' for states").

For those reasons, assuming Congress was sufficiently clear about the fact that state participation was conditioned on a waiver, there is every reason to treat acceptance of that benefit as a valid waiver of Eleventh Amendment immunity.[27] With respect to commission decisions approving or rejecting interconnection agreements, Congress could not have been more clear. Section 252(e)(6) plainly authorizes review in federal court of such decisions, and section 252(e)(4) meanwhile precludes review in state court. As for enforcement activities, the condition may not be quite as clear, but for the reasons stated in Section I, *supra*, we submit that states still can fairly be said to be on notice that their enforcement actions will be reviewed in federal court if they choose to participate under the Act.

To be sure, a state commission may *want* to participate in every determination under the Act, rather than leave any matter to the FCC, and may prefer not to waive immunity at the same time. But the same is true of any benefit or "gratuity" offered by Congress: states would prefer to have it, and often without the conditions Congress attaches. The desirability of the benefit, however, does not make Congress' invitation coercive rather than voluntary. *See South Dakota v. Dole*, 483 U.S. 203,

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[27] If Congress had acted sequentially – first preempting all of local interconnection and then a year later authorizing states to participate if they waived their immunity – the application of the "gratuity" analysis would be easy. It cannot make a difference that Congress took both steps in the same Act.

211 (1987) (a gratuity is not "unconstitutional simply by reason of its success in achieving the congressional objective").[28]

Because the ICC voluntarily accepted the benefit of participating in the administration of the 1996 Act and was on clear notice that doing so would subject it to federal court jurisdiction, it waived its Eleventh Amendment immunity with respect to claims that its decisions violate the Act.

CONCLUSION

For the reasons set forth above, the decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

[28] Nothing in the Act requires states to waive their immunity in order to regulate aspects of local telecommunications that are not addressed by the Act. The Act's local competition provisions concern only one narrow (albeit important) slice of regulation: interconnection between competing carriers. *See Puerto Rico Tel. Co. v. Telecommunications Reg. Bd. of P.R.*, 189 F.3d 1, 11-12 (1st Cir. 1999). A state that declines to participate in the regulation of interconnection under the Act can continue regulating the vast bulk of intrastate telecommunications.

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No. 00-878

In the Supreme Court of the United States

RICHARD L. MATHIAS, ET AL., PETITIONERS,

v.

WORLDCOM TECHNOLOGIES, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether a state commission's decision altering the terms of an interconnection agreement approved under section 252 of the Telecommunications Act of 1996 is a "determination under [section 252]" and thus reviewable in federal court under section 252(e)(6) of the Act.

2. Whether a state commission's voluntary acceptance of Congress's invitation under the 1996 Act to participate in implementing a federal regulatory program that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an action seeking prospective relief against state public utility commissioners in their official capacity for alleged ongoing violations of federal law in performing federal regulatory functions under the 1996 Act can be maintained under the *Ex parte Young* doctrine.

LIST OF PARTIES TO THE PROCEEDING BELOW

AT&T Communications of Illinois, Inc.

Brent S. Bohlen, in his official capacity as a Commissioner of the Illinois Commerce Commission

Focal Communications Corporation

Terry Harvill, in his official capacity as a Commissioner of the Illinois Commerce Commission

Edward C. Hurley, in his official capacity as a Commissioner of the Illinois Commerce Commission

Illinois Bell Telephone Company d/b/a Ameritech Illinois

Richard Kolhauser, in his official capacity as a Commissioner of the Illinois Commerce Commission

Ruth Kretschmer, in her official capacity as a Commissioner of the Illinois Commerce Commission

Richard Mathias, in his official capacity as a Commissioner of the Illinois Commerce Commission

Karl McDermott, in his official capacity as a Commissioner of the Illinois Commerce Commission

MCIMetro Access Transmission Services, Inc.

MCI Telecommunications Corporation

Dan Miller, in his official capacity as a Commissioner of the Illinois Commerce Commission

Mary F. Squires, in her official capacity as a Commissioner of the Illinois Commerce Commission

Teleport Communications Group, Inc.

Worldcom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.

RULE 29.6 STATEMENT

Respondent Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications Inc.

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The opinion of the court of appeals (Pet. App. 6a-22a) is reported at 179 F.3d 566 (7th Cir. 1999). That opinion was amended by subsequent order (Pet. App. 3a-5a), which was not reported. The opinion of the district court (Pet. App. 23a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1999, and amended on August 19, 1999. Petitions for panel rehearing and rehearing en banc were denied on August 9, 2000. Justice Stevens granted petitioners' application to extend the date for filing their petition for a writ of certiorari to November 28, 2000. The petition was granted on March 5, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court under 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337.

STATEMENT

This case will determine whether the federal courts have jurisdiction under section 252(e)(6) of the Telecommunications Act of 1996 to review claims that state commissions have violated the procedural and substantive requirements of the Act by imposing new obligations on local exchange carriers under the guise of "interpreting" interconnection agreements previously approved by those commissions. The case arises from an Illinois commission determination that Ameritech is required by its interconnection agreements to pay tens of millions of dollars in reciprocal compensation to competing local carriers on Internet traffic. The interconnection agreements themselves limit Ameritech's obligations to pay reciprocal compensation to the reciprocal compensation requirements of the Act, and the FCC has authoritatively determined that "ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5)." *ISP Remand Order*, FCC 01-131 ¶ 3 (Apr. 27, 2001); accord *id.* ¶¶ 23, 30. The Illinois Commerce

Commission nonetheless ruled that such payments are required under the Act and that Ameritech agreed to make them.

The question is whether federal courts have jurisdiction to review this decision. The Seventh Circuit held that although the federal district court had jurisdiction over this case under section 252(e)(6) of the Act — because the commission decision was one "under" the Act — the federal court could not review Ameritech's claim that the state commission unlawfully nullified the terms of its interconnection agreements, which the commission treated as raising an ordinary state law question of contractual interpretation. The effect of this holding is to strip federal courts of the power to review claims that state commissions have imposed obligations on local exchange carriers that are inconsistent with the binding terms of those agreements, contrary to the requirements of the Act. This raises serious dangers of inconsistent interpretations of the obligations of telephone service providers across the 50 states, and of allowing state commissions to pursue regulatory policies in direct contravention of federal policy, without federal review. We urge this Court to hold — consistent with the language and structure of the Telecommunications Act — that all state commission determinations "under" section 252 of the Act are reviewable in federal court to decide whether they are consistent with the congressional scheme.

A. Federally Mandated Interconnection "Agreements" Under The Telecommunications Act Of 1996. The 1996 Act establishes a "new *federal* regime" that "fundamentally restructures local telephone markets" and "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 379 n.6, 397 (1999) (emphasis in original). As Justice Scalia's opinion for the Court explained, "the question" under the Act "is not whether the Federal Government has taken the regulation of local telecommunications competition away

from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*" *Id.* at 379 n.6 (emphasis added).

The key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252. Those sections govern the formation and content of "interconnection agreements." Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. Private parties are free to determine with whom and on what terms they will deal; if they are unable to reach agreement after arms-length negotiations, they can simply walk away from the bargaining table without an agreement. Under the Act, however, Congress has compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that implement "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371. See generally 47 U.S.C. § 251(b)-(c).

If an incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be required by federal statute or regulation, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include the disputed provision. Further, section 252(i) makes the terms and conditions in one interconnection agreement immediately available to any other requesting carrier, thereby setting an absolute floor for future agreements. In short, the Act sets forth a detailed framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs. Section 252 interconnection "agreements" are not ordinary contracts but regulatory vehicles for implementing these Congressional commands.

Because the Act's default rules for local competition are explicitly set forth and easily invoked, incumbent LECs have

little incentive to give more, and competing LECs have little incentive to take less, than the Act requires. Accordingly, even "negotiated" terms in section 252 "agreements" often are incorporated without any give and take between the parties because federal law makes clear the rights of the competing LEC and the duties of the incumbent LEC. Although embodied in a "negotiated" agreement, the obligations are commonly framed in statutory terms and precisely track federal statutory requirements. See *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). The agreement "means" and "intends" nothing more nor less than to comply with the requirements of the Act. As explained below, the parties to the Agreements here said just that with respect to their federally mandated reciprocal compensation obligations.

B. The Process For Entering Into, And Resolving Disputes Under, Section 252 Interconnection Agreements. Section 252 of the Act prescribes the process through which competing LECs arrive at agreements with incumbent LECs for the performance of duties imposed by section 251. A competing LEC initiates the section 252 negotiation process by requesting interconnection with an incumbent LEC. 47 U.S.C. § 252(a). The incumbent then may "negotiate and *enter into a binding agreement* with the requesting telecommunications carrier or carriers," without regard to the substantive requirements of the Act. *Id.* § 252(a)(1) (emphasis added). However, as noted above, the competing carrier has no incentive to accept less, or the incumbent to give more, than the statute's default provisions prescribe.

If the parties fail to reach full agreement through negotiation alone, the Act permits them to petition the state commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1). In conducting section 252 arbitrations, state regulators resolve open issues by "imposing appropriate conditions as required to implement [section 252(c)],"

provided that those conditions "meet the requirements of section 251" and the FCC's rules implementing it. *Id.* §§ 252(b)(4)(C), 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder").

After all issues have been resolved, through negotiation, arbitration, or both, the parties submit the agreement to the state commission for approval. 47 U.S.C. § 252(e). The state commission must then "approve or reject the agreement" (*id.* § 252(e)(1)) in accordance with standards mandated by the Act. See *id.* §§ 252(e)(1), (2). Commission-approved agreements become "binding" regulatory mandates with which the parties must comply and which the commission has no authority to alter. *Id.* § 252(a)(1). Further, because the terms of approved agreements become immediately available to all other requesting competitors who elect to adopt them (*id.* § 252(i)), the obligations in approved interconnection agreements not only define the parties' duties to each other but may also determine the incumbent's duties toward other carriers.

The FCC and most state commissions have understood the Act to authorize state commissions to interpret and enforce agreements they have approved under section 252. The FCC has held that any "dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252" of the Act. *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277, ¶ 6 (2000) ("*Starpower*"). As the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements *are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act.*" Brief for the United States and the FCC as Intervenors at 19, *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.* (8th Cir. filed Mar. 22, 2000) (No. 99-3952) (emphasis

added). Section 252(e)(5) requires the FCC to discharge any "responsibility under this section in any proceeding or other matter under this section" that a state commission is authorized to undertake but declines to perform, subject to federal court review under the Hobbs Act (47 U.S.C. § 252(e)(6)).

C. Federal Judicial Review. Section 252(e)(6), entitled "Review of State commission actions," states in broad and generic language that "[i]n *any case* in which a State commission makes a *determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [sections 251 and 252]." 47 U.S.C. § 252(e)(6) (emphasis added).[1] The statute does not contemplate any state commission action taken under section 252 of the Act that is not subject to federal court review.

D. The Dispute Over Payment Of Reciprocal Compensation On Internet Traffic.

1. Reciprocal compensation under the 1996 Act. The underlying dispute in this case involves the statutory "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" imposed on local exchange carriers under section 251(b)(5) of the Act. Section 252(d)(2) of the Act requires that reciprocal compensation arrangements under section 251(b)(5) "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Construing these statutory

[1] "The term 'State commission' means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41).

provisions, the FCC has held that Internet traffic "is not subject to the reciprocal compensation provisions of section 251(b)(5)." *ISP Remand Order* ¶ 35; accord *id.* ¶¶ 3, 23, 30.[2]

2. Reciprocal compensation under the parties' agreements. As required by the Act (47 U.S.C. §§ 251(b)(5), 252(d)(2)), Ameritech entered into interconnection agreements that establish reciprocal compensation arrangements between the parties. The reciprocal compensation provision in each Agreement appears under a heading that cites the reciprocal compensation provision set forth in the Act: "Reciprocal Compensation Arrangements — Section 251(b)(5)." J.A. 9a, 14a, 20a, 25a, 33a. And the Agreements specifically provide that the parties' reciprocal compensation obligations are "As Described in the Act" (J.A. 8a, 14a, 20a, 30a, 38a), which is in turn defined in each agreement to mean "as described in or required by the Act" (J.A. 8a, 13a, 19a, 30a, 37a).

[2] The FCC found that the assessment of reciprocal compensation on Internet traffic represented a "classic regulatory arbitrage" (*ISP Remand Order* ¶ 21) that created a "windfall" for new entrants receiving such payments (*id.* ¶ 70). While reciprocal compensation was founded on the assumption "that traffic back and forth on these interconnected networks would be relatively balanced," in reality "ISP modems do not generally call anyone in the exchange." *Id.* ¶ 21. Thus, "traffic to ISPs flows one way," and "so does money in a reciprocal compensation regime." *Ibid.* The FCC explained that such "large one-way flows of cash" have "distort[ed] the development of competitive markets" (*ibid.*) and encouraged carriers to compete by shifting their costs to incumbent carriers — even where the competitor is using the incumbent's own facilities — rather than on the basis of quality or efficiency. Such a subsidy, the agency noted, "cannot be sustained * * * in the competitive markets for telecommunications services envisioned by the 1996 Act." *Id.* ¶ 4.

E. The Proceedings Below.

1. The ICC order. In 1997, several competing LECs filed complaints against Ameritech before the Illinois Commerce Commission ("ICC"), alleging that Ameritech had violated its section 252 interconnection agreements by failing to pay reciprocal compensation on Internet traffic routed through Internet Service Providers ("ISPs"). Numerous similar disputes arose nationwide. The amounts at stake in this case alone measure in the tens, if not hundreds, of millions of dollars.

The question before the ICC was whether the competing LECs were entitled under their Agreements with Ameritech to receive reciprocal compensation on Internet traffic. As noted above, the Agreements expressly provide that the parties' reciprocal compensation arrangements are "As Described in the Act," which is in turn defined to mean "as described in or required by the Act." Nonetheless, the ICC Commissioners, explicitly invoking "jurisdiction under the [Illinois] Public Utilities Act and Section 252 of the Telecommunications Act of 1996 * * * to interpret and enforce the terms of interconnection agreements" (J.A. 112a), agreed with the competing LECs and held that "by discontinuing its reciprocal compensation payments" on Internet traffic, Ameritech violated "its interconnection agreements, and its duty under the Act." *Id.* at 114a.

2. The District Court decision. Ameritech brought an action in federal district court against the Commissioners in their official capacities under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, seeking review of the Commissioners' Order. The Commissioners moved to dismiss for lack of jurisdiction and on Eleventh Amendment immunity grounds. The district court denied the motion, finding jurisdiction under section 252(e)(6) (Pet. App. 26a-29a & n.3), and holding that the Commissioners (i) waived the state's Eleventh Amendment

immunity by participating voluntarily in the federal regulatory scheme under the Act and, in the alternative, (ii) were subject to suit in their official capacities under the *Ex parte Young* doctrine. *Id.* at 30a. But the court upheld the Commissioners' determination on the merits, characterizing the issue as "whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act" for Internet-bound traffic, and holding that the ICC did not err in determining that the agreements and section 251(b)(5) do, in fact, require reciprocal compensation on such traffic. J.A. 166a-167a.

3. The Seventh Circuit decision. On appeal, Ameritech argued that (i) "the Act does not require reciprocal compensation" on Internet traffic, (ii) "the agreements precisely track the Act (reciprocal compensation is 'as described in the Act')," and (iii) "therefore the agreements cannot require reciprocal compensation for calls to ISPs." Pet. App. 19a. Ameritech did not argue that the Act *prohibited* Ameritech from agreeing to pay reciprocal compensation on Internet calls. Rather, Ameritech argued that (i) the Act did not *require* payment of reciprocal compensation on Internet calls, and (ii) Ameritech did not agree to pay reciprocal compensation on Internet calls, but instead entered into a binding section 252 agreement that *limited* Ameritech's reciprocal compensation obligations to compensation required by the Act.

The court of appeals rejected the Commissioners' Eleventh Amendment immunity argument as "no longer tenable" (Pet. App. 12a) in light of binding circuit precedent established in *MCI Telecommunications Corp.* v. *Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), amended, 183 F.3d 558 (7th Cir.), vacated, 183 F.3d 567 (7th Cir. 1999), opinion after reh'g, 222 F.3d 323 (7th Cir. 2000), cert. denied,

121 S. Ct. 896 (2001).[3] Then, despite the court's recognition that "[d]ecisions of state agencies implementing the 1996 Act are reviewable in federal district courts" (*Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)), the court determined that it had no jurisdiction to decide Ameritech's principal claim on appeal. Pet. App. 4a-5a.

The Seventh Circuit refused to decide whether the Commissioners erred in holding that Ameritech's section 252 agreements required the payment of reciprocal compensation on Internet calls. Pet. App. 4a-5a. In the court's view, a claim that the Commissioners "'interpret[ed]' an agreement contrary to its terms creates a different kind of problem — one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Ibid.* Thus, the court refused to adjudicate Ameritech's claim that the Commissioners failed to enforce the provisions of the section 252 agreements that expressly limited Ameritech's reciprocal compensation obligations to those "described in or required by the Act." Instead, the court determined only that, assuming that the Commissioners correctly interpreted the agreements, federal law would not prohibit such agreements. *Id.* at 17a-18a.

As the panel recognized, its construction of the Act creates a bifurcated "allocation of authority," pursuant to which review of state commission determinations concerning section

[3] On rehearing in that case, the Seventh Circuit held that "the Eleventh Amendment does not bar these suits against the state commissions and their commissioners" for two independent reasons. *MCI II*, 222 F.3d at 328. First, the court held that "in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Ibid.* Second, the court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Ibid.*

252 agreements would be divided between federal and state courts. Pet. App. 4a-5a. The panel acknowledged that "[t]his allocation of authority has a potential to cause problems," and "may not have much to recommend it," because "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.'" Pet. App. 5a. Under the panel's decision, therefore, Ameritech's claim that the ICC failed to enforce express limitations on the scope of Ameritech's obligation to pay reciprocal compensation under its federally mandated interconnection agreements presents a question reviewable only in state court — even though (i) the Act specifically provides (47 U.S.C. § 252(a)) that the terms of such agreements are "binding" as a matter of federal law, (ii) the obligation to pay reciprocal compensation is mandated by section 251(b)(5) of the Act, and (iii) Ameritech's *claim* in this case is that its section 252 agreements expressly limit the payment of reciprocal compensation to instances where such payment is "required by the Act."

SUMMARY OF ARGUMENT

I. The initial question presented in this case is whether the federal courts have jurisdiction to review Ameritech's claim that a state commission has nullified vital provisions in binding interconnection agreements that implement national telecommunications policy under the 1996 Act. Federal jurisdiction exists under both 28 U.S.C. § 1331 (see Brief for Petitioners in No. 00-1531) and section 252(e)(6) of the Act.

Section 252(e)(6) provides in broad and inclusive terms that "[i]n *any case* in which a State commission makes a *determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement * * * *meets*

the requirements of section 251 of this title and this section." (Emphasis added.) The FCC and numerous state commissions — including petitioners themselves in the Order giving rise to this case — have held that a state commission decision resolving the precise claim raised by Ameritech constitutes a "determination under [section 252]." Ameritech's claim that petitioners violated the Act by abrogating binding terms of its Agreements squarely raises the question whether the Agreements, as modified by petitioners, "meet[] the requirements of" the Act. Ameritech's claim thus fully satisfies the textual prerequisites for section 252(e)(6) jurisdiction.

The structure and purpose of the Act confirm federal court jurisdiction over Ameritech's claim. In section 252 Congress made clear its intent that regulatory determinations defining the rights and obligations in interconnection agreements conform to the procedural and substantive standards of the Act. Section 252(e)(6) provides the mechanism for ensuring that federal courts have authority to "draw the lines to which [state officials] must hew" and "bring * * * to heel" state officials who are "not regulating in accordance with federal policy." *AT&T Corp.*, 525 U.S. at 379 n.6. Whether a state commission imposes obligations on private carriers in the context of (i) arbitrating a disputed term before initial approval of an agreement or (ii) interpreting a disputed term in a previously approved agreement, the effect of its decision is the same. The federal interests in uniformity and consistency with federal law also are the same. Petitioners' argument that the former category of cases should be resolved in federal court and the latter category in state court would substantially undermine the statutory scheme and impose adverse consequences that Congress could not have intended.

II. The second question before the Court is whether petitioners' voluntary performance of federal regulatory functions under the Act constitutes a waiver of the state's

Eleventh Amendment immunity. It is well established that Congress may solicit the states' voluntary consent to private suits in federal court. The Act does precisely that. It invites state commissions to participate as "deputized federal regulator[s]" (*MCI II*, 222 F.3d at 344), subject to federal court review under section 252(e)(6). At the same time, however, sections 252(e)(5) and (e)(6) establish a parallel regulatory scheme in which the FCC performs those federal regulatory duties that a state declines to perform, again subject to federal review.

Petitioners voluntarily accepted Congress's offer to participate in this regulatory program. They recited specifically that they were proceeding under section 252 of the Act, a provision that expressly mandates federal court review. Nevertheless, petitioners now claim that their actions did not amount to a waiver of Eleventh Amendment immunity. Petitioners contend that Congress did not provide sufficient notice that federal court review was a condition of state participation. But section 252(e)(6) of the Act could hardly be clearer with respect to the consequences of making a "determination" defining obligations in section 252 agreements.

Petitioners also claim that they were unconstitutionally coerced by Congress into regulating under the Act. That argument cannot be squared with this Court's precedents, holding that Congress is free to condition a grant of authority that a state would not otherwise possess on the state's consent to suit in federal court. Petitioners do not dispute that Congress could have given the FCC all regulatory responsibilities under the 1996 Act, instead of giving the states the opportunity to perform those responsibilities if they so desired. Because Congress created the regulatory regime established by the 1996 Act, it had the power to offer or withhold authority to act as a regulator in the implementation of the new federal statute. For that reason, petitioners'

premise that their actions constitute "otherwise permissible activity" is mistaken. Under the Act, petitioners may unquestionably choose not to participate (as the Virginia commission repeatedly has done). However, if they elect to participate, they must do so according to Congress's rules.

III. The third question is whether petitioners are proper parties to this lawsuit under the *Ex parte Young* doctrine. As this Court consistently has held, that doctrine is essential to ensure that state officials do not use the Eleventh Amendment to avoid compliance with federal law. To determine whether an official capacity suit against a state officer may proceed, this Court has established a "straightforward inquiry" into whether the complaint alleges an ongoing violation of federal law and seeks prospective declaratory or injunctive relief.

Although they concede the continued vitality of *Ex parte Young*, petitioners contend that the doctrine does not apply in this case for two reasons. First, relying on *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), petitioners claim that their "discretionary" acts cannot violate federal law. However, this Court's decisions consistently hold that state officers have no "discretion" to violate federal law and can be enjoined if they do so. Second, relying on *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), petitioners assert that the remedies available under *Ex parte Young* are inconsistent with the Act's remedial scheme. Petitioners' argument turns *Seminole Tribe* on its head. In that case the Court refused to apply *Ex parte Young* because Congress had imposed severe restrictions on the remedies that the federal courts would otherwise have had at their disposal (including *Ex parte Young* relief). Here, Congress has imposed no such limitations. Congress has provided for federal court review to ensure the very compliance with federal law that *Ex parte Young* traditionally has guaranteed.

ARGUMENT

I. THE FEDERAL COURTS HAVE JURISDICTION OVER AMERITECH'S CLAIMS UNDER 47 U.S.C. § 252(e)(6).

A. The governing statutory language encompasses Ameritech's claim. Ameritech's claim in this case is straightforward: (i) its interconnection agreements expressly limit Ameritech's reciprocal compensation obligations to the requirements of section 251(b)(5) of the 1996 Act, (ii) section 251(b)(5) does not require reciprocal compensation on Internet traffic, and, therefore, (iii) petitioners' Order imposing an obligation to pay reciprocal compensation on Internet traffic violates section 252(a)(1) of the Act, which makes an approved interconnection agreement the "binding" statement of the parties' interconnection rights and obligations. The threshold question before this Court is whether the federal courts have jurisdiction over that claim.

For the reasons stated in petitioners' brief in the companion case, *Verizon North, Inc.* v. *Public Serv. Comm'n of Maryland*, Nos. 00-1531 & 00-1711 (consolidated), the federal courts clearly have general federal question jurisdiction over Ameritech's claim in this case (and Verizon's parallel claim) pursuant to 28 U.S.C. § 1331.[4] In addition, section 252(e)(6) of the Act expressly provides federal courts with jurisdiction to review state commission decisions defining obligations prescribed in interconnection agreements mandated by the 1996 Act. That provision confers federal subject matter jurisdiction here.

Section 252(e)(6), entitled "Review of State commission actions," provides that "[i]n *any case* in which a State

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[4] Ameritech's complaint alleged jurisdiction under section 252(e)(6) and section 1331 (J.A. 126a, 127a), and Ameritech preserved this argument in the district court and in the court of appeals.

commission makes a *determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement *meets the requirements of* section 251 of this title and this section." 47 U.S.C. § 252(e)(6) (emphasis added). In permitting federal judicial review in "any case" involving a "determination under this section," Congress plainly intended federal courts to review any "state commission actions" taken pursuant to section 252. The broad and inclusive language of section 252(e)(6) easily encompasses Ameritech's claim in this case. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (statutory construction must begin "with the language of the statute itself").

"Determination under this section." As petitioners note (at 18), this Court considered the meaning of the phraseology pertinent here in *Ardestani* v. *INS*, 502 U.S. 129 (1991). In that case, the Court looked to the "most natural reading" of the statutory language and determined that the term "under" means "'subject to' or 'governed by'" or "'by reason of the authority of.'" *Id.* at 135. Applying those definitions to the statutory language at issue in this case, any state or federal regulatory determination that particularizes or gives legal effect to obligations in a federal interconnection agreement mandated by section 252 of the Act is a "determination under section 252."

In its role as primary administrator and enforcer of the 1996 Act, the FCC has construed the relevant statutory text to confirm that a dispute such as this one falls squarely within the responsibilities of the state commission "under section 252." *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 (2000). In *Starpower*, as here, a competing LEC initiated a complaint proceeding before a state commission "with respect to a dispute concerning the interpretation and enforcement of its interconnection agreements." *Id.* ¶ 1. The

competing LEC claimed that the incumbent LECs owed reciprocal compensation on Internet traffic under their section 252 interconnection agreements. *Id.* ¶ 3. The state commission refused to resolve this dispute (*id.* ¶ 4) and the competing LEC requested the FCC to do so.

Because the FCC only has jurisdiction under section 252(e)(5) if the state commission would have had jurisdiction under section 252, the FCC first had to determine whether "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252." *Starpower*, ¶ 6. The FCC held squarely that it did. It then concluded that the state commission's refusal to resolve the interpretation dispute before it concerning "inter-carrier compensation for ISP-bound traffic" constituted a "failure to act" within the meaning of section 252(e)(5). *Id.* ¶ 7. Accordingly, the FCC held that it would "proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: *whether the existing interconnection agreements between Starpower and GTE and Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic.*" *Id.* ¶ 9 (emphasis added). Thus, in a ruling entitled to deference here, the FCC has confirmed that the precise state commission "determination" at issue in this case is one made "under section 252."

Moreover, numerous state commissions have acknowledged that they act "under section 252" in resolving disputes concerning the obligation to pay reciprocal compensation on Internet traffic pursuant to section 252 agreements.[5] Indeed, petitioners' own contemporaneous

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[5] See, *e.g.*, *In re Emergency Petitions of ICG Telecom Group*, No. 26619, slip op. at 5 (Ala. PSC Mar. 4, 1999); *Connect Communications Corp.* v. *Southwestern Bell Tel. Co.*, No. 98-167-C,

opinion acknowledged that they acted "under" section 252 when they defined and enforced the terms of Ameritech's federal Agreements. In the March 1998 Order that gave rise to Ameritech's section 252(e)(6) lawsuit, petitioners unequivocally stated that "[t]his Commission's jurisdiction *under* the Public Utilities Act and *Section 252 of the Telecommunications Act of 1996* * * * to interpret and enforce the terms of interconnection agreements is not disputed." J.A. 112a (emphasis added).[6] Because section 252 is the sole

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1998 WL 974059, at *4-*5 (Ark. PSC Dec. 31, 1998); *Intermedia Communications* v. *BellSouth, Inc.*, No. 991534-TP, 2000 WL 1532553, at *2, *10 (Fla. PSC Sept. 14, 2000); *In re Complaint of e.spire Communications, Inc.*, No. 9281-U, slip op. at 3 (Ga. PSC Feb. 16, 1999); *In re Complaint of Time Warner Communications*, No. 41097, slip op. at 2 (Ind. URC Feb. 3, 1999); *In re WorldCom Technologies*, Decision T.E. 97-116, 1998 WL 941813 (Mass. DTE Oct. 26, 1998); *In re Application for Approval of an Interconnection Agreement*, Nos. U-11178, et al., slip op. at 14 (Mich. PSC Jan. 28, 1998); *In re Complaint of MCImetro Access Transmission Services*, No. 97-1723-TP-CSS, slip op. at 6 (Ohio PUC Oct. 14, 1998); *In re Application of Brooks Fiber Communications*, No. PUD 970000548, slip op. at 6 (Okla. Corp. Comm'n June 3, 1998); *Electric Lightwave, Inc.* v. *U S West*, No. UC 377, Order No. 99-285, slip op. at 3 (Or. PUC Apr. 26, 1999); *Petition for Declaratory Order of TCG Delaware Valley*, No. P-00971256, slip op. at 20 (Pa. PUC June 16, 1998); *In re NEVD*, No. 2935, Order No. 15915, 1999 WL 987057, at *4 (R.I. PUC July 21, 1999); *In re Petition of Brooks Fiber*, No. 98-00118, slip op. at 12 (Tenn. Reg. Auth. Apr. 21, 1998); *Complaint of MCImetro Access Transmission Services*, No. 6720-TD-102, slip op. at 5 (Wis. PSC Jan. 18, 2000).

[6] In so ruling, petitioners cited the Eighth Circuit's decision in *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part, 525 U.S. 366 (1999). That decision held that "the state commissions' plenary authority to accept or reject" interconnection agreements under section 252(e)(1) of the Act "carries with it the authority to enforce the provisions of the agreements that the state commissions have approved." *Id.* at 804. Thus, the decision on which

source of petitioners' authority to exercise regulatory power over federal interconnection agreements, their decisions purporting to "interpret" or "enforce" the terms of such agreements necessarily constitute determinations under section 252 that are reviewable in federal court under section 252(e)(6).[7]

As Verizon has demonstrated in its brief in the companion case, interconnection agreements are tantamount to federal tariffs. See Brief for Petitioner in No. 00-1531, § I.B.2. Like tariffs, section 252 interconnection agreements are federal regulatory vehicles required by law, their terms are made binding by law, and they apply generally to all similarly situated carriers requesting services from a public utility. Under this Court's decisions, any "question of tariff construction" arising after initial filing or approval falls "within the exclusive primary jurisdiction" of the ICC by

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petitioners' own jurisdictional analysis rested concluded that (i) section 252 authorized state commission jurisdiction over disputes that arise after the initial agreement approval, and (ii) state commission decisions enforcing the terms of previously approved section 252 agreements are "determinations under section 252" that are subject to federal court review under section 252(e)(6). See *id.* at 804 n.24.

[7] Petitioners' post hoc argument in this Court is also flatly contradicted by the categorical statement — in a brief filed in the D.C. Circuit in the appeal of the *ISP Remand Order* signed by amicus National Association of Regulatory Utility Commissioners (whose members include petitioners) — that "[o]nce the State commission approves an interconnection agreement, *it is charged with interpreting and enforcing the agreement, but the State commission determinations are subject to review in federal court for consistency with the Act.*" Brief for State Commission Petitioners and Supporting Intervenor at 3-4, *WorldCom, Inc., et al.* v. *FCC* (D.C. Cir. filed Aug. 28, 2001) (Nos. 01-1218, et al.) (emphasis added) (citing 47 U.S.C. § 252(e)(6)).

virtue of the delegation of authority in section 252. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63 (1956).

"Meets the requirements of" sections 251 and 252. Ameritech's claim also satisfies the second textual prerequisite for federal jurisdiction under section 252(e)(6). In providing federal court review "to determine whether the agreement * * * meets the requirements of" sections 251 *and* 252, Congress made clear that allegations that an agreement does not comply with the requirements of the Act are matters of federal concern. Ameritech claims that petitioners violated the section 252(a)(1) requirement that approved interconnection agreements be enforced as "binding" statements of the parties' rights and duties by nullifying express limitations on Ameritech's reciprocal compensation obligations. That claim directly raises the question whether the Agreements, as interpreted, "meet[] the requirements of" the Act. To resolve the merits of Ameritech's claim, a court must determine whether the state commission imposed new obligations (as Ameritech alleges) or simply enforced the terms to which the parties agreed (as the ICC erroneously concluded). But for purposes of federal jurisdiction, Ameritech's allegations are controlling. *Bell* v. *Hood*, 327 U.S. 678, 685 (1946).[8]

Notwithstanding the broad language of section 252(e)(6) and the unequivocal declaration in their March 1998 Order, petitioners now argue that section 252(e)(6) does not provide federal jurisdiction. Pet. Br. 16-20. According to petitioners, jurisdiction under that section is limited to state commission

[8] See 11 Richard A. Lord, *Williston on Contracts* § 31:5 (4th ed. 1999) ("[T]he interpretation or construction of a contract does not include its modification or the creation of a new or different agreement; a court is not at liberty to revise, modify, or distort an agreement while professing to construe it, and has no right to make a different contract from that actually made by the parties").

determinations concerning the "approval" of interconnection agreements.

This argument is doubly flawed. To begin with, the language of section 252(e)(6) makes no reference whatsoever to state commission "approval" of an interconnection agreement. As explained above, the operative terms in that provision are "determination under this section" and "meets the requirements of" federal law. There is no basis for inferring from the generic language chosen by Congress any intent to adopt petitioners' artificial limitation on federal jurisdiction. See, *e.g.*, *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 243-248 (1989) (rejecting proposed narrowing construction of general statutory terms); *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982) (declining to "engraft artificial limitations" on broad statutory language).

Beyond this, even if one were to import the notion of "approval" into section 252(e)(6), Ameritech's claim would fit comfortably within the scope of that provision. Ameritech contends that petitioners' determination that Ameritech must pay reciprocal compensation when compensation is *not* required by the Act effectively nullified express limitations in the parties' negotiated Agreements. Petitioners' action resulted in the formation and approval of *new* interconnection obligations.

B. The structure and purpose of the Act confirm federal jurisdiction here. Contrary to petitioners' contention (Pet. Br. 20), this Court has consistently stressed that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). Statutory construction is "a holistic endeavor" (*United States* v. *Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1443 (2001)), and courts accordingly must "interpret the statute 'as

a symmetrical and coherent regulatory scheme,'" and "'fit, if possible, all parts into an harmonious whole.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). These canons of interpretation confirm the existence of federal jurisdiction here.

1. ***The design of the statute as a whole.*** As this Court has noted, the Act's division of authority between state and federal bodies is unusual. See *AT&T Corp.*, 525 U.S. at 379 n.6 ("a federal program administered by 50 independent state agencies is surpassing strange"). In deciding to allow state regulators to perform a central role in implementing federal policy, Congress used the mechanism of federal court review to ensure that the state agencies comply with federal law. State regulators are not "allowed to do their own thing." *Ibid.* They must adhere to the federal rules of the game. Section 252(e)(6) serves the critical function of empowering federal courts to "draw the lines to which [state officials] must hew" and to "bring * * * to heel" state officials who are "not regulating in accordance with federal policy." *Ibid.* This consideration applies to *all* state commission determinations under section 252 — not just to initial "approvals."

State commission decisions to approve or reject interconnection agreements are indisputably subject to federal court review. Federal review is not less important when state commissions exercise federal authority to interpret and enforce obligations carriers have assumed under the Act. This case provides a textbook example. When the Agreements in question were negotiated, Internet use was in its infancy, and the parties did not specifically address how Internet traffic would be treated for reciprocal compensation purposes. If they had done so and the present dispute had arisen at that time, the matter would have been resolved by arbitration, and either party could have taken the dispute to federal court for an authoritative ruling. Instead, however, the parties negotiated and the Commission approved agreements

providing that reciprocal compensation would be made only "as required" by the Act. When the dispute arose over the applicability of reciprocal compensation to Internet traffic, the matter was taken to the state commission, which assumed jurisdiction "under Section 252." At this juncture, the question is the same, the federal interest is the same, and the private interests are the same, as they would have been in the context of an initial approval. Federal review serves the same purpose of ensuring conformity of state commission decisions to federal policy.

In sum, decisions determining the substance of a carrier's obligations in the context of "interpretation and enforcement" of an agreement are functionally identical — in terms of the federal interest — to decisions determining the substance of a carrier's obligation in the context of "approval" of an agreement. The only difference is one of timing. It would have made no sense for Congress to have excluded such a large and important class of cases — involving state commission determinations issued under the authority of *federal* law to implement *federal* law obligations under *federally* mandated agreements — from the Act's judicial review scheme. Nowhere in the statute did Congress authorize state commissions to implement federal policy without federal review. There is no reason to bypass federal review here.

2. ***The goal of federal uniformity.*** Petitioners' proposed construction would also frustrate Congress's manifest design to ensure *uniform* implementation of the 1996 Act. Congress provided for federal judicial review to safeguard the integrity of the regulatory vehicle that it created to implement the national telecommunications policies established by the Act — the section 252 interconnection agreement. That objective is accomplished through federal judicial review of all state commission determinations affecting interconnection obligations for compliance with federal law. Petitioners' reading of section 252 arbitrarily excludes a substantial category of

regulatory determinations from federal judicial review. Such a reading "produces a most chopped-up statute" (*AT&T Corp.*, 525 U.S. at 382 n.8) that frustrates the goal of uniformity. Ameritech's interpretation of the Act's judicial review provisions, by contrast, achieves Congress's purposes by treating the Act "'as a symmetrical and coherent regulatory scheme.'" *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

Despite their recognition that Congress wanted "assurance that [interconnection] agreements meet the requirements of federal and state law" (Pet. Br. 24), petitioners insist that federal judicial review of state commission decisions should occur only at the time the agreement is approved. The flaw in petitioners' argument is their assumption that a state commission's initial approval is an endpoint in the formation of interconnection rights and obligations. Petitioners themselves concede that "interpretation cases will likely represent the great bulk of litigation regarding interconnection agreements, as an agreement need only be approved once but may be interpreted in any number of subsequent disagreements between parties." Pet. Br. 24. This is an understatement. As the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act." Brief for the United States and the FCC as Intervenors at 19, *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.* (8th Cir. filed Mar. 22, 2000) (No. 99-3952). It would pervert Congress's regulatory scheme to conclude that such determinations — which are, in substance, binding arbitrations of disputed terms in the agreements — are not reviewable in federal court under section 252(e)(6).

Contrary to petitioners' suggestion that Congress was concerned solely with the formalities of agreement formation — and was content to leave to the state courts review of

subsequent state commission determinations giving "substance" to those agreements — section 252 evinces Congress's intent to ensure that commission action defining rights and obligations prescribed in a section 252 agreement comports with federal law. Time and again, Congress declared that regulators and courts should ensure that interconnection terms imposed outside the negotiation process meet the requirements of federal law. For example, in section 252(c), entitled "Standards for arbitration," Congress provided, *inter alia*, that "[i]n resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall — (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title; [and] (2) establish any rates for interconnection, services, or network elements according to subsection (d) [of section 252]." 47 U.S.C. § 252(c). Similarly, Congress stated that a "State commission may only reject" portions of an agreement adopted by arbitration "if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section." *Id.* § 252(e)(2)(B).

These provisions reflect Congress's paramount concern that state commission decisions affecting the obligations in a section 252 interconnection agreement comply with federal law. And Congress maintained its focus on compliance with federal law in prescribing the scope of federal court jurisdiction under section 252(e)(6). Congress directed federal courts reviewing "State commission actions" — and, in particular, state commission "determinations under this section" — to "determine whether the agreement or statement meets the requirements of section 251 of this title and this

section." *Id.* § 252(e)(6). That provision reflects the perfect correspondence between state commission power to make regulatory "determination[s] under this section" and federal judicial review of such determinations for compliance with federal procedural and substantive law. There is no indication in the Act that Congress intended any deviation from this pervasive pattern of federal court review for the large class of "interpretation" and "enforcement" cases.

Petitioners' proposed bifurcation raises the specter of state agency determinations that nullify the effectiveness of federal judicial review of initial approval decisions and the development of divergent bodies of law in federal and state courts. Once a federal court has placed its imprimatur on a section 252 agreement as "meet[ing] the requirements of" federal law, a state commission should not be permitted, under the guise of "interpretation" or "enforcement," to alter the terms of such an agreement in a way that violates federal law. If petitioners were correct in asserting that a state commission may do that without federal judicial review, a state commission easily could evade Congress's intent to give federal courts the final word on whether state regulatory determinations under section 252 meet the requirements of the Act. The jurisdictional grant to review approval decisions to determine whether an agreement "meets the requirements of" the Act would be entirely ineffectual without continuing federal jurisdiction over subsequent state commission interpretations of the same agreement that allegedly violate the Act.

As one court of appeals has pertinently noted, Congress "could not have intended" such an arbitrary, time-based limitation on judicial review, because "certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved." *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 235 F.3d 493, 497 (10th Cir. 2000). It is

"most unlikely that Congress created such a strange hodgepodge." *AT&T Corp.*, 525 U.S. at 382 n.8; see also *Sheridan* v. *United States*, 487 U.S. 392, 402-403 n.7 (1988) (courts should strive to avoid such interpretations, "particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading"); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible").

3. ***The federal nature of interconnection agreements.*** There is no merit to petitioners' suggestion (Br. 24-26) that disputes over whether a state commission has nullified the terms of a binding section 252 interconnection agreement raise only issues of state contract law. As noted above, section 252 agreements are not ordinary private contracts; they are federal regulatory instruments that require incumbent carriers to cooperate with their competitors and share facilities in ways that are dictated by the requirements of the 1996 Act and the FCC's implementing regulations.

It is an understatement to say that, in "negotiating" the terms of "agreements," the parties bargain in the shadow of federal law. The Act imposes "a host of duties" on incumbent LECs (*AT&T Corp.*, 525 U.S. at 371) and correspondingly confers on competing LECs substantive federal rights to obtain access to private property at cost-based rates. If an incumbent LEC does not "agree" to accept what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission or the FCC to compel the incumbent to include those purported requirements in the "agreement."

An approved agreement thus is a carrier-specific federal regulation that implements federal law and policy. "[M]any so-called 'negotiated' provisions represent nothing more than

an attempt to comply with the requirements of the 1996 Act." *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). In fact, carriers may adopt terms that simply incorporate the requirements of the Act and its implementing regulations — in which case a dispute over the obligations imposed under the agreement is essentially a dispute over the meaning of the Act.

Not surprisingly, in serving as deputized federal regulators that interpret and enforce federal interconnection agreements, state commissioners are regularly called upon to make determinations on important issues of federal law. Here, for example, not only did the parties draft critical provisions of their Agreements (including those at issue in this dispute) to track the requirements of federal law, but petitioners overtly ruled on the scope of federal law in reaching their decision. J.A. 114a-116a. And that ruling — that federal law requires the payment of reciprocal compensation on Internet traffic — is at odds with the FCC's recognition that Internet traffic is "not subject to the reciprocal compensation requirement in section 251(b)." *ISP Remand Order* ¶ 23.

Moreover, section 252(i) makes the terms and conditions of any interconnection agreement immediately available to any other requesting carrier, just like the terms and conditions of a federally-approved tariff. That section severely restricts an incumbent LEC's ability to engage in ordinary "give-and-take," because "every concession * * * made (in exchange for some other benefit) * * * will automatically become available to every potential entrant." *AT&T Corp.*, 525 U.S. at 395. As a consequence of section 252(i), any regulatory determination by a state commission that abrogates the terms of a section 252 "agreement" or deviates from federal law has industry-wide effect. The notion that such a determination simply gives rise to a state law contract action is untenable.

C. The Seventh Circuit erroneously concluded that it lacked jurisdiction over Ameritech's core claim. The Seventh Circuit agreed with Ameritech that Congress conferred federal jurisdiction over state commission determinations made after the initial agreement approval. Pet. App. 13a-14a. Yet, as Ameritech has demonstrated in its cross-petition in this case (No. 00-921), the Seventh Circuit contradicted its own reading of the Act by concluding that it lacked jurisdiction over Ameritech's core claim.

The source of the Seventh Circuit's error was its view that, in reviewing a state commission determination, a federal court must *assume* that the commission respected the terms of the parties' interconnection agreement. Like petitioners, the Seventh Circuit believed that the question whether a state commission deviated from the terms of a binding section 252 agreement presents a problem "under the law of contracts, and therefore one for which a state forum can supply a remedy." Pet. App. 5a. Thus, under the Seventh Circuit's view, the federal courts' role under section 252(e)(6) is simply to ask whether the commission's presumptively correct interpretation results in an agreement that violates federal law.

The Seventh Circuit's reading of the Act's judicial review provision leads to an implausible outcome and reduces federal jurisdiction to the vanishing point. As explained above, negotiated agreements, like those at issue here, need not comply with the Act's substantive requirements at all. Under the Seventh Circuit's decision, an aggrieved party may go to federal court to complain that a state commission's determination interpreting a negotiated term of a previously approved agreement is inconsistent with the 1996 Act. But the federal courts must *always* reject that claim because negotiated agreements are *always* consistent with the requirements of the Act. In short, the dispositive question, as framed by the Seventh Circuit, must yield the same result in *every* case involving a negotiated term of a section 252

agreement. The only "real" claim in such a case — whether the state commission's action nullified the terms of the parties' section 252 agreement, and thus imposed new obligations in violation of section 252(a) — would have to be heard in state court. Congress could not have intended such a fragmentary and pointless division of jurisdiction.[9]

II. PETITIONERS' VOLUNTARY ACCEPTANCE OF CONGRESS'S OFFER TO PARTICIPATE IN THE ACT'S REGULATORY PROGRAM WAIVED THE STATE'S ELEVENTH AMENDMENT IMMUNITY.

In *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999), this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit in federal court. See also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"); accord *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997). *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress clearly has conditioned on waiver of immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. 527 U.S. at 676, 678 n.2, 686-687. At the same time, the Court made clear that a state does not waive its Eleventh

[9] The ultimate purpose of the "constitutional doubt" rule, invoked by petitioners (at 27-28), is to effectuate Congressional intent. The rule "has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. 1711, 1719 (2001). Accordingly, where, as here, "Congress has made its intent clear" through legislative text, structure, and purpose, the courts "'must give effect to that intent.'" *Miller* v. *French*, 530 U.S. 327, 336 (2000) (quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962)).

Amendment immunity simply by engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *Id.* at 687.

Petitioners present two arguments in support of their contention that, notwithstanding their resolution of the parties' dispute under section 252, they did not consent to be made parties to a lawsuit seeking "[r]eview of State commission actions" under section 252(e)(6). First, petitioners contend that Congress did not request and the state did not grant with sufficient clarity either the *quid* or the *quo* necessary to effectuate a waiver. Second, petitioners assert that because the 1996 Act excludes nonconsenting states from the "otherwise permissible activity" of regulating local telephone service, it offers a "one-sided" choice that is so inherently coercive as to foreclose altogether any notion of a voluntary waiver. Neither argument has merit.

A. Petitioners have knowingly and voluntarily consented to federal jurisdiction. *College Savings*, *Alden*, and *Coeur d'Alene Tribe* all confirm that Congress may offer, and a state may accept, a deal that results in the state's relinquishment of its Eleventh Amendment immunity. However, in determining whether a state has waived its immunity "in the context of a particular federal program" (*Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 n.1 (1985)), this Court has required "that Congress speak with a clear voice" so that states may "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The 1996 Act plainly satisfies this test.

1. As the Seventh Circuit explained, the 1996 Act plainly and properly solicits a waiver of sovereign immunity. The Act sets forth parallel structures pursuant to which an administrative body exercises regulatory authority over interconnection arrangements, subject to review in federal

court. 47 U.S.C. § 252. If that regulatory responsibility is undertaken by the FCC pursuant to 47 U.S.C. § 252(e)(5), the FCC defends its actions in the federal courts of appeals as provided in the Hobbs Act, 28 U.S.C. § 2342. If a state public utility commission accepts Congress's offer to act as a deputized federal regulator under the Act, the commission does so with full knowledge that the Act permits aggrieved parties to seek review of state commission "determinations under [section 252]" in federal district court under 47 U.S.C. § 252(e)(6). Whether state or federal regulators perform the duties set forth in section 252, the Act expressly provides that a federal court will review those regulatory determinations. Thus, Congress made it "unmistakably clear in the language of the statute" (*Atascadero*, 473 U.S. at 242) that any state commission that elects to participate in the federal regulatory scheme by making determinations under section 252 consents to review of its actions in federal court for compliance with federal law. See *Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (joining Court's opinion with the understanding that clear statement rule does not preclude elimination of Eleventh Amendment immunity through "statutory text that clearly subjects States to suit * * * though without explicit reference to state sovereign immunity or the Eleventh Amendment").[10]

Petitioners' accusation that the Seventh Circuit improperly ignored the statutory text in finding the requisite statement of intent is inexplicable. The Seventh Circuit looked to *all* of the relevant language of section 252(e) before concluding that the state could have had no reasonable misapprehension as to the

[10] Petitioners' contention that Congress did not make sufficiently clear that the determination made in this case would be reviewable in federal court is belied by petitioners' own acknowledgment that they acted "under" section 252 of the Act in exercising authority "to interpret and enforce the terms of [the Agreements]." J.A. 112a; see also *id.* at 121a.

consequences of its participation in the Act's federal regulatory scheme.[11]

2. Petitioners also suggest that their *conduct* in voluntarily participating in proceedings under section 252 is not a sufficient manifestation of consent to suit in federal court. This is incorrect. Whether a state has waived its Eleventh Amendment immunity is a question of federal law. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-279 (1959). This Court's decisions establish that a state can manifest its consent by accepting a Congressionally extended benefit. For example, Congress may, "in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that *acceptance of the funds entails an agreement to the actions*." *College Savings*, 527 U.S. at 686 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (emphasis added)).

Justice Kennedy's concurring opinion in *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998), describes other circumstances in which a state's conduct may give rise to a waiver. In *Schacht*, Justice Kennedy discussed whether Wisconsin waived its immunity by consenting to removal of a case from state court — despite being under no compulsion to do so. *Id.* at 393-398 (Kennedy,

[11] Even though the "clear statement" test is satisfied here, there is no need to apply it in this context. The reason for requiring a clear statement is to determine with confidence that the quid pro quo includes an infringement of the state's sovereign interests. *Dellmuth*, 491 U.S. at 231. Here, there is no such infringement. Congress has created a scheme of "cooperative federalism" in which states may choose to regulate private activity under new rules set by Congress. Far from intruding on the states' turf, Congress has invited the states to enter the FCC's turf. If the state opts to act as a deputized federal regulator, it must agree to be treated like one for purposes of judicial review.

J., concurring). In answering this question in the affirmative, Justice Kennedy explained:

> [T]he absence of specific authorization, it seems to me, is not an insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court. If the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

Id. at 397 (Kennedy, J., concurring).

Under *Petty*, *Dole*, and *College Savings*, and consistent with Justice Kennedy's concurrence in *Schacht*, when Congress invites states to voluntarily participate as deputy federal regulators, it may define what action by the state constitutes waiver. As explained above, in section 252(e)(6) of the Act Congress unmistakably offered the states an opportunity to act as deputized federal regulators in exchange for the states' consent to have their actions reviewed in the federal courts. Congress also made it clear that state regulators are free to decline the offer, in which case federal regulators will stand in the shoes of their state counterparts and their decisions will be subject to federal review. By voluntarily wielding federal regulatory power under section 252 of the Act, petitioners knew that their actions would "bind [Illinois] to the jurisdiction of the federal court." *Schacht*, 524 U.S. at 397 (Kennedy, J., concurring). There can be no doubt about this. Petitioners expressly invoked section 252 of the Act when they made the determination at issue, and cited judicial authority stating that their interpretive ruling would be subject to federal court review. See pp. 17-18 & n.6, *supra*.

B. Petitioners were free to decline to participate in the federal program. Petitioners contend that they did not voluntarily waive the state's Eleventh Amendment immunity because the 1996 Act compels the state's "consent" to suit in federal court as the price for continued participation in the "otherwise permissible activity" of regulating local telephone service. That argument misapprehends both this Court's decision in *College Savings* and the 1996 Act.

1. In *College Savings*, this Court held that there is a distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in "otherwise permissible activity" (which is unconstitutional). The Court therefore overruled its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. Because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its immunity. *College Savings*, 527 U.S. at 687, 691.

However, this Court in *College Savings* also reaffirmed its earlier holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987). These cases together establish that Congress is free to condition a grant of money or regulatory authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or receipt of federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." *College*

Savings, 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.* at 686. See also *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281, 1284 (10th Cir. 1999) (holding in a post-*College Savings* case that the state "knowingly and voluntarily waived its Eleventh Amendment immunity" because the state agency "consent[ed] to participate in a federal program and to follow the conditions thereof, including participation in certain federal bankruptcy functions"), cert. denied, 529 U.S. 1037 (2000). *College Savings* thus confirms that Congress may, consistent with the Eleventh Amendment, allow states to exercise authority under a federal program on the condition that the exercise of that authority will be subject to federal review.

2. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

There is no question that Congress has plenary authority under the Commerce Clause to enact legislation regulating local telephone competition. See *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982) ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). Congress exercised its authority under the Commerce Clause to enact a comprehensive federal statute governing aspects of local telecommunication competition. As this Court has noted, "[w]ith regard to the matters addressed by the 1996 Act," Congress "has taken the regulation of local telecommunications competition away from the States."

AT&T Corp., 525 U.S. at 379 n.6.[12] Accordingly, the states have no *right* to participate in the regulation of those subjects under the new federal scheme. Congress, in its sole discretion, could have decided that the federal statute would be implemented exclusively by federal regulators.

State participation in implementing the 1996 Act simply cannot be characterized as an "otherwise permissible activity." State regulation under the 1996 Act is a wholly new regulatory activity, established by Congress to impose new obligations on incumbent LECs that foster a pro-competitive, de-regulatory national policy. It is only through the 1996 Act that potential new entrants gain the right to request interconnection under new, highly favorable terms, 47 U.S.C. § 251(c), and it is only through the Act that implementing agreements are formed which a state commission may, if it so chooses, arbitrate, modify, approve, reject, interpret, or enforce. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's regulatory program. Participating in the administration of a federal regulatory

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[12] Petitioners suggest (at 36) that "[t]he Act itself belies" this Court's conclusion that Congress has broadly preempted state regulatory authority. Petitioners first invoke a savings clause, section 601(c) of the Act, which purportedly preserves preexisting federal and state law absent explicit preemption. But the 1996 Act expressly displaces state law and this Court consistently has warned against "plac[ing] more weight on the saving clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme." *United States* v. *Locke*, 529 U.S. 89, 105 (2000); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869, 870 (2000). Petitioners also observe that 47 U.S.C. § 152 assigns regulatory jurisdiction over local telecommunications to the states. But in *AT&T Corp.*, this Court held that the 1996 Act broadly reassigned regulatory authority over a wide range of subjects relating to local telecommunications to the federal government. 525 U.S. at 379 n.6, 382 n.8.

program as a deputized federal regulator is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a key role in the administration of the "new *federal* regime." *AT&T Corp.*, 525 U.S. at 379 n.6 (emphasis in original). The Act does not, however, compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state declines Congress's invitation, the Act merely provides that the FCC will play the federal regulatory role, applying the same federal standards, again subject to federal judicial review. *Ibid.*

The 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The opportunity to participate *as a regulator* in the implementation of a federal statute — a function that could not antedate the 1996 Act and which Congress could have reserved exclusively to the FCC — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity does not implicate unique federal interests. By contrast, when a state acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. The assertion of federal jurisdiction here does not expose the state to any monetary liabilities or interfere with its own internal government operations, but simply provides for federal court review of federal issues arising between private parties in the administration of a

federal program to ensure compliance with federal law. This is not a substantial burden or intrusion.[13]

In short, the Seventh Circuit's decision does not conflict with this Court's decision in *College Savings*. Rather, it follows inexorably from this Court's reaffirmation of *Petty* and *Dole*.

III. PETITIONERS ARE PROPER PARTIES TO THIS LAWSUIT UNDER THE *EX PARTE YOUNG* DOCTRINE.

If this Court concludes that petitioners' voluntary participation in the Act's regulatory program waived the state's Eleventh Amendment immunity, there is no need to reach the final question on which the Court granted certiorari. Should the Court decline to find waiver, however, Ameritech's suit against petitioners may proceed under the *Ex parte Young* doctrine.

A. This Court's decisions confirm that *Ex parte Young* applies here. Under *Ex parte Young* and its progeny, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332,

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[13] Whether *state* law made Congress's invitation to perform federal regulatory functions an offer that petitioners could not refuse has no bearing on this Court's Eleventh Amendment analysis. Because Congress has made clear that a state commission's determinations under section 252 are subject to review in federal court, the Illinois statutes requiring the state commission to make such determinations are properly viewed as express legislative waivers of Eleventh Amendment immunity. In view of the fact that petitioners' participation in the federal regulatory scheme is *optional* under federal law and *mandatory* under state law, petitioners' claim (at 38) that their "presence in federal court resulted not from a choice made and expressed by the State of Illinois, but from the unilateral action of Congress" has it exactly backwards.

337 (1979). As this Court has observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. 123, 159-160 (1908). The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and "to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

This Court permitted actions to enjoin state officials acting in violation of federal law long before *Ex parte Young*. See *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-305 & n.14 (1952) (noting that the Court had "long held," prior to 1908, that injunctive actions against state officers could proceed consistent with the Eleventh Amendment and that *Ex parte Young* merely "reexamined and reaffirmed" that principle); *Ex parte Young*, 209 U.S. at 167 (noting that "jurisdiction of this general character has * * * been exercised by Federal courts from the time of *Osborn* v. *Bank of United States*," a case decided in 1824). Federal courts have repeatedly reviewed the actions of state public utility commissions pursuant to the rule of *Ex parte Young*. See, *e.g.*, *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951); *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941); *Bacon* v. *Rutland R.R. Co.*, 232 U.S. 134 (1914); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908). Indeed, this Court has previously entertained a suit against members of the Illinois Commerce Commission seeking to

enjoin a quasi-judicial order entered by the Commission. *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300 (1937).

This Court's recent decisions reaffirm the vitality of the *Young* doctrine. In *Alden* v. *Maine*, for example, this Court reiterated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-748 (1999); see also *id.* at 757.[14] To determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-299 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Ameritech's claims easily meet this test,

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[14] Two Terms earlier, all nine Justices of this Court reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997); see also *id.* at 281 ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke [*Ex parte Young*]"); *id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment) ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar"); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("in the absence of some congressional limitation a federal court may entertain an individual's suit to enjoin a state officer from official action that violates federal law"). As Justice O'Connor stated, the *Ex parte Young* doctrine remains a "basic principle of federal law" that reflects "the importance of having federal courts open to enforce and interpret federal rights." *Id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

because Ameritech (i) alleges that petitioners violated federal law by imposing onerous interconnection obligations on Ameritech that clash with the terms of Ameritech's binding section 252 interconnection agreements and (ii) seeks equitable relief from those allegedly unlawful obligations. See J.A. 125a-146a.

B. *Larson* and *Seminole Tribe* are irrelevant here. Petitioners concede each of the following points: (i) "the Eleventh Amendment is generally not a bar to actions by private citizens in federal court to restrain state officials from committing ongoing violations of federal law" (Pet. Br. 41), (ii) the "continued vitality" of the *Ex parte Young* doctrine "is not in doubt" (*ibid.*), and (iii) *Ex parte Young* "applies if a state officer is alleged to be committing an ongoing violation of federal law" (*id.* at 42). Yet petitioners insist that this case falls outside the "generally" applicable *Ex parte Young* paradigm for two reasons. First, petitioners contend that under *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), they "cannot be said to violate federal law by resolving disputes within their lawful jurisdiction" (Pet. Br. 45), even if in so doing they commit "errors of federal law" (*id.* at 44). Second, relying on *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), petitioners assert that Congress "provid[ed] a specific mechanism for judicial review of state commission decisions rendered under the Act," and thereby "signaled its intent not to subject individual commission members" to the remedies available under *Ex parte Young*. Pet. Br. 41. Neither argument has merit.

1. Petitioners' reliance on *Larson* is misplaced. In *Larson*, the complaint alleged generally that a federal official was acting "illegally" and that his conduct was "unauthorized" (337 U.S. at 691), but there was no specific allegation "of any statutory limitation on his powers" (*id.* at 703), nor was there a claim that he was "acting unconstitutionally or pursuant to an unconstitutional grant of

power." *Id.* at 691. See also *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 693 (1982) (explaining that, in *Larson*, the federal officer's actions had been undertaken "pursuant to legitimate contractual authority," were "neither ultra vires nor unconstitutional," and "constituted at most a tortious deprivation of property").

In determining whether federal sovereign immunity applied, the *Larson* Court distinguished cases involving an alleged violation of federal statutory or constitutional law from those, like *Larson* itself, in which the sole claims involved alleged breaches of common law. The Court emphasized that "[u]nder our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions." *Larson*, 337 U.S. at 704. Thus, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Id.* at 689. If the actions of a government official do not conflict with the official's statutory or constitutional authority, however, "then they are the actions of the sovereign, whether or not they are tortious under general law." *Id.* at 695. As this Court later summarized, *Larson* ruled that the plaintiff's suit failed because "the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers." *Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962).

Here, unlike *Larson*, Ameritech has clearly alleged that petitioners have breached a duty to comply with the substantive and procedural requirements imposed by federal law. *Alden*, 527 U.S. at 755 ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design"). Once petitioners opted to participate in the review of interconnection agreements under section 252 of the 1996

Act, they were duty bound under the Supremacy Clause to ensure that their actions comported with federal law. In particular, petitioners' task was to ensure that the terms of the parties' Agreements "me[t] the requirements of" the Act — including the requirement that the Agreements have "binding" effect (47 U.S.C. § 252(a)(1)) and that the parties' relationship be conducted "in accordance with the terms and conditions of" the Agreements (*id.* § 251(c)(2)(D), (c)(3)). Under *Ex parte Young* and its progeny, action in violation of valid federal law lies beyond the scope of any official authority, and a suit alleging that a state officer has taken such action thus is deemed to be against the officer as an individual, not against the state, for Eleventh Amendment purposes.[15]

In other words, under the Supremacy Clause, petitioners have no "discretion" to violate federal law when discharging their duties under the Act. *Ex parte Young*, 209 U.S. at 159-160; see *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974) (explaining that since *Ex parte Young*, "it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law"). Indeed, in *Ex parte Young* itself, this Court rejected the very argument advanced by petitioners here — namely, that a suit seeking to enjoin a state official from taking action that was alleged to violate federal law was barred by the Eleventh Amendment

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[15] Although *Ex parte Young* itself involved an alleged violation of the Constitution, this Court has consistently applied the rule to conduct that violates federal statutory and regulatory law as well. See, *e.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment) ("if a state official violates federal law, he is stripped of his official or representative character"); *id.* at 300 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("Later cases have made it clear that a state official's act is also ultra vires for purposes of the *Young* doctrine when it violates other valid federal law").

because it would interfere with the officer's discretionary official duties. 209 U.S. at 144, 159.

Applying these well settled principles to the circumstances of this case, it is readily apparent that petitioners' reliance on the concept of discretion is misplaced. As this Court has noted, in allowing "the state commissions' participation in the administration of the new *federal* regime," Congress has not "allowed [the commissions] to do their own thing." *AT&T Corp.*, 525 U.S. at 379 n.6 (emphasis in original). To the contrary, "if the federal courts believe a state commission is not regulating in accordance with federal policy," there is "no doubt" that the courts "may bring it to heel" by "draw[ing] the lines to which [it] must hew." *Ibid.* As noted above, Ameritech claims that petitioners here failed to "regulat[e] in accordance with federal policy." In particular, Ameritech claims that petitioners violated federal law by imposing interconnection obligations on Ameritech that clash with the terms of Ameritech's binding section 252 interconnection agreements. Under *Ex parte Young*, these allegations of ongoing violations of federal law by state officials, sued in their official capacities for prospective injunctive relief, more than suffice to overcome any Eleventh Amendment bar to suit.[16]

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[16] Petitioners' reliance (at 43, 44) on *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984), also is misplaced. The issue in *Pennhurst* was whether a "claim that petitioners violated *state law* in carrying out their official duties * * * is one against the State and therefore barred by the Eleventh Amendment." *Id.* at 103 (emphasis added). The Court reiterated that "an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State." *Id.* at 113. At the same time, however, the Court emphasized that *Ex parte Young* "permitt[ed] suits alleging conduct contrary to 'the supreme authority of the United States.'" *Id.* at 102. *Pennhurst* therefore is fully consistent with *Larson*'s teaching that where an officer's actions are limited by federal statute (or by the Constitution), actions beyond those

2. Petitioners also perceive a conflict between the Seventh Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As demonstrated below, the detailed remedial scheme that strictly limits the methods of judicial redress under the Indian Gaming Regulatory Act ("IGRA") in ways that are inconsistent with the remedies available under *Ex parte Young* simply has no analog under the Telecommunications Act of 1996. Unlike the IGRA, the 1996 Act places no limitations at all on the remedies that a federal court may fashion in a section 252(e)(6) suit to ensure that the obligations imposed on incumbent LECs through interconnection agreements comport with the Act. *Ex parte Young* and the Act's judicial review provisions work together to effectuate Congress's intent in the 1996 Act that state officials exercising federal regulatory power under the Act adhere to federal law. See *AT&T Corp.*, 525 U.S. at 379 n.6.

As this Court observed in *Seminole Tribe*, 517 U.S. at 73-74, the IGRA imposes a duty on states to negotiate in good faith with Indian tribes concerning gambling on reservations, 25 U.S.C. § 2710(d)(3)(A), "in conjunction with" a very "carefully crafted and intricate remedial scheme" for limited enforcement of that duty, *id.* § 2710(d)(7). For example, although the IGRA authorizes a federal court to order a state to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(B)(iii), the IGRA does not permit the court to enforce its own order with contempt sanctions as it may do in normal circumstances. If a state flouts the court's order to negotiate, the court may do nothing more than refer the matter to a mediator. *Id.* § 2710(d)(7)(B)(iv); see *Seminole Tribe*, 517 U.S. at 74. Most important, under the IGRA a state cannot be subjected to judicial sanctions, such as contempt, even if it refuses to honor the compact selected by the mediator. In that event, "the only sanction * * * is that the mediator shall notify the

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limitations are considered individual and not sovereign actions. *Larson*, 337 U.S. at 689-695.

Secretary of the Interior who then must prescribe regulations" governing gaming on the tribal lands at issue. *Id.* at 74-75.

The Court in *Seminole Tribe* reaffirmed the vitality and importance of the *Ex parte Young* doctrine in "ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. As the Court explained, "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Id.* And the Court stressed that *Ex parte Young* may be used to enforce state compliance with federal law *except* in the rare case in which (i) Congress has *specifically limited* the judicial remedies available against a state or its officials *and* (ii) those statutory limitations are *inconsistent* with the judicial remedies available against state officials under *Ex parte Young*. *Id.* at 71-72 & nn.14, 16. Applying this standard to the IGRA, the Court concluded that by confining the available remedies to a "quite modest set of sanctions," Congress had "strongly indicate[d] that [it] had no wish to" permit the judicial remedies against state officials that would be available under *Ex parte Young*. *Id.* at 75-76.

Allowing a party to use the federal courts to coerce a state into compliance with the IGRA through an injunction under *Ex parte Young*, backed by the threat of contempt, would have completely undermined the non-coercive remedial scheme established by Congress. But where, as here, Congress has *not* limited the available avenues of judicial redress, *Ex parte Young* continues to apply. *E.g.*, *Ellis* v. *University of Kansas Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1998) (allowing suit under *Ex parte Young* because 42 U.S.C. § 1981 contains "nothing that indicates a 'detailed remedial scheme' designed to limit or prevent potential remedies within the *Seminole Tribe* meaning"); *Marie O.* v. *Edgar*, 131 F.3d 610, 616 (7th Cir. 1997) (same).

There is no tension, let alone inconsistency, between an *Ex parte Young* remedy and the Congressionally prescribed remedy under the judicial review provision in the 1996 Act. Unlike the situation in *Seminole Tribe*, permitting section 252(e)(6) suits to proceed under *Ex parte Young* would not "cast[] aside * * * limitations" that Congress intentionally crafted through "a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 517 U.S. at 74. Contrary to petitioners' contentions, there are *no* limitations in section 252(e)(6) on the remedies that a federal court may invoke. Section 252(e) simply instructs the federal court to review the state regulators' actions for compliance with the 1996 Act and, if those actions deviate from the Act, the court may fashion any appropriate relief needed to ensure that the officials "hew" to "the lines" drawn by the Act. *AT&T Corp.*, 525 U.S. at 379 n.6.

Finally, the 1996 Act also differs from the IGRA with respect to who may be sued. In *Seminole Tribe*, this Court looked to the statutory language in concluding that the IGRA did not contemplate "both a suit against a State * * * and a suit against a state official." 517 U.S. at 75 n.17. As the Court noted, the IGRA refers repeatedly to "the State." *Ibid.* And "the duty imposed by the Act — to 'negotiate * * * in good faith to enter into' a compact with another sovereign — stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers." *Ibid.* Neither circumstance is present here. First, the definition of "State commission" in the Act reveals that Congress did not intend to refer to the sovereign, but instead to the group of officials exercising delegated power within the state government: "The term 'State commission' means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C.

§ 153(41). Second, the state commission determinations that are reviewable under section 252(e)(6) are always performed by "an individual state executive officer or * * * a group of officers." *Seminole Tribe*, 517 U.S. at 75 n.17.

In actions for judicial review of an agency determination, it is standard procedure for the agency or its officials to appear in federal court to defend its decision. See, *e.g.*, 5 U.S.C. § 702; Fed. R. App. P. 15. Such suits are so frequent that Fed. R. App. P. 43 provides for automatic substitution of successor officers when officials leave office. And, as noted above (see p. 40, *supra*), lawsuits against state officials challenging the collective decisions of state agencies have been commonplace for nearly a century under *Ex parte Young*. When Congress provided for "[r]eview of State commission actions" in section 252(e)(6), it was legislating against the background rule that agencies or agency officials are usually parties to the judicial review of their orders. In short, Congress must be presumed to have known that the *Ex parte Young* doctrine enables the federal courts to "bring * * * to heel" recalcitrant state officials who refuse to "hew" to "the lines" drawn by the Act and its implementing regulations. *AT&T Corp.*, 525 U.S. at 379 n.6.

It would be difficult to conceive of a tighter fit between the remedy contemplated in the Act (a federal court order requiring that the agreement conform to the standards of the federal Act) and *Ex parte Young*'s core function of permitting "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *Ex parte Young*). Review under *Ex parte Young* in no way expands the scope of judicial review or the remedies available under the Act. Unlike the IGRA, the Act does not prohibit courts from ordering appropriate equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies"

under a federal statute. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).

As one federal court recently noted, "the remedy provided for by statute [under the Act] and the remedy under *Young* are one and the same." *Bell Atlantic-Delaware, Inc.* v. *Global NAPs South, Inc.*, 77 F. Supp. 2d 492, 501 (D. Del. 1999). Petitioners' effort to use *Seminole Tribe* to circumvent the federal review that Congress deemed necessary would effectively turn that decision's reasoning on its head and subvert the federalism and supremacy purposes that *Ex parte Young* has fostered for nearly a century.

CONCLUSION

The decision of the Seventh Circuit should be affirmed in part and reversed in part and the case remanded with instructions to the courts below to adjudicate Ameritech's claims on the merits.

Respectfully submitted.

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In the Supreme Court of the United States

RICHARD L. MATHIAS, ET AL., PETITIONERS

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state commission's action relating to the enforcement of a previously approved Section 252 interconnection agreement entered into pursuant to the Telecommunications Act of 1996 is a "determination under [Section 252]" and thus is reviewable in federal court under 47 U.S.C. 252(e)(6) (Supp. IV 1998).

2. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

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In the Supreme Court of the United States

No. 00-878

RICHARD L. MATHIAS, ET AL., PETITIONERS

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals as initially issued (Pet. App. 6a-22a) is reported at 179 F.3d 566. The opinion was amended by a subsequent order (Pet. App. 3a-5a) that is not reported. The opinion of the district court (Pet. App. 23a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1999, and amended on August 9, 1999. A petition for rehearing was denied on August 9, 2000. On November 3, 2000, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 28, 2000. The petition for a writ of certiorari was filed on November 28, 2000, and was granted on March 5, 2001. The jurisdiction of

this Court rests on 28 U.S.C. 1254(1). On August 8, 2001, the Court granted the motion of the United States to intervene in the case pursuant to 28 U.S.C. 2403.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution is set forth in the appendix to the petition at 36a. Sections 251 and 252 of the Telecommunications Act of 1996 are set forth in the appendix to petitioners' brief at 1a-22a. Citations of that Act are of the 1999 Supplement to the United States Code.

STATEMENT

The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The 1996 Act establishes procedures to encourage competition in local telecommunications markets, including the requirement that incumbent carriers enter into agreements with competitors concerning interconnection with, and access to elements of, the incumbent's network. The Act authorizes state public utility commissions to assume certain regulatory authority respecting those agreements (commonly referred to as interconnection agreements) and provides that such exercises of authority are subject to review in federal district court. 47 U.S.C. 252(e)(6). This case concerns whether federal judicial review extends to decisions of state commissions interpreting and enforcing interconnection agreements and, if so, whether state commissions or state commissioners, in their official capacities, may be made

parties to those proceedings consistent with the Eleventh Amendment.

1. For many years, most telephone service in the United States was provided by AT&T and its local-exchange affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1 *et seq.*, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). In 1982, AT&T entered into a consent decree in settlement of that suit that required AT&T to divest its local exchange operations. The newly independent Bell Operating Companies, together with approximately 1,500 non-Bell carriers, continued to provide monopoly local exchange service in their respective service areas. What remained of AT&T continued to provide nationwide long-distance service, increasingly in competition with other long-distance carriers, such as MCI and Sprint. See H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 48-50 (1995).

a. In considering how to facilitate the entry of competitors into local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's entire local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the

existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Congress addressed those concerns in Sections 251 and 252 of the 1996 Act. It imposed various obligations on all local exchange carriers, incumbents and new entrants alike, including the obligations to provide number portability (so that a consumer may change carriers without changing telephone numbers), to allow competitors to have access to certain services (*e.g.*, directory assistance) and facilities (*e.g.*, poles, ducts, conduits, and rights-of-way), and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). The underlying dispute in this case concerns an arrangement to pay reciprocal compensation, which is a payment made by the carrier whose customer originates a call to the carrier whose facilities are used to complete the call.

Congress also imposed on incumbent carriers the obligation to open their networks to new entrants in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2). Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are

entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4).[1]

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding reciprocal compensation, interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration if the parties cannot conclude an agreement through negotiation. 47 U.S.C. 252(b).

The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and in regulations promulgated by the Federal Communications Commission (FCC) pursuant to the Act), arbitrate disputes that arise in the negotiation of the agreements, and exercise review and enforcement authority. If a state commission elects not to assume such authority, the FCC will perform that role. 47 U.S.C. 252(e)(5).

b. All interconnection agreements, whether arrived at through negotiation or arbitration, are subject to approval by the state commission or, if it declines that role, the FCC. 47 U.S.C. 252(e)(1) and (5). A negotiated agreement may be approved by the state commission (or the FCC) only if it does not "discriminate[]

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[1] The Court is currently considering a challenge to the methodology developed by the Federal Communications Commission (FCC) for establishing the rates that incumbents may charge new entrants for interconnection and access to network elements. See *Verizon Communications, Inc.* v. *FCC*, Nos. 00-511 et al. (to be argued Oct. 10, 2001).

against a telecommunications carrier not a party to the agreement" and is "consistent with the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state commission (or, if it declines that role, the FCC) will resolve any open issue. Such issues may concern the rates, terms, and conditions under which competitors will interconnect with or lease network elements from incumbents, as well as the charges that the incumbent and the new entrant will pay each other for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). Once an agreement has been concluded through arbitration, the parties must submit it to the state commission (or, if it declines that role, the FCC) for approval. An arbitrated agreement may be approved only if it complies with Sections 251 and 252 of the Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B).

The 1996 Act provides for federal court "[r]eview of State commission actions" with respect to interconnection agreements. 47 U.S.C. 252(e)(6) (title). The Act states, in relevant part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6). The Act divests state courts of "jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

Where a state commission has elected not to assume regulatory authority under the 1996 Act and the FCC has acted in its place, the Act provides that the FCC proceeding and "any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. 252(e)(6). The FCC's final orders with respect to interconnection agreements are reviewable, as are other final orders of the FCC, in the federal courts of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*

2. Pursuant to Sections 251 and 252 of the 1996 Act, respondent Ameritech, the incumbent local exchange carrier in Illinois, negotiated interconnection agreements with several carriers seeking to enter that market. Each of those agreements provided for the payment of reciprocal compensation "[a]s [d]escribed in the Act." J.A. 8a, 13a, 19a, 30a, 38a.

The parties submitted the interconnection agreements to the Illinois Commerce Commission (ICC) for approval as specified in 47 U.S.C. 252(e)(1). The ICC assumed regulatory authority and approved the agreements. Soon after the ICC approved the agreements, a dispute arose between Ameritech and the competing carriers concerning whether the obligation to pay reciprocal compensation under the agreements applied to calls made to Internet service providers (ISPs) to obtain access to the Internet. Ameritech took the position that its obligation to pay reciprocal compensation "[a]s [d]escribed in the Act" did not extend to such Internet-bound calls.

The competing carriers petitioned the ICC for relief, seeking orders directing Ameritech to pay reciprocal compensation under the terms of its interconnection agreements. The ICC assumed regulatory authority to resolve the dispute, invoking its "jurisdiction under the [state] Public Utilities Act and Section 252 of the Telecommunications Act of 1996." J.A. 112a. The ICC concluded that Ameritech was required to pay reciprocal compensation for Internet-bound calls.

3. Ameritech sought review of the ICC's decision in the United States District Court of the Northern District of Illinois, asserting that the ICC's decision was contrary to federal law and invoking the court's jurisdiction under 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331. J.A. 127a, 140a-141a (claim that ICC's order is inconsistent with FCC's declaratory ruling that ISP-bound calls are not "local" for purposes of reciprocal compensation under 1996 Act and FCC's implementing regulations); see also U.S. Br. 19 note 3, *Verizon Maryland Inc.* v. *Public Serv. Comm'n of Md.*, Nos. 00-1531 et al. (discussing FCC's declaratory ruling). Ameritech named as defendants the competing carriers and the ICC commissioners in their official capacities.

The ICC commissioners moved to dismiss. They argued that the district court lacked subject-matter jurisdiction and, in any event, that they were immune from suit under the Eleventh Amendment.

The district court denied the motion. The court held that 47 U.S.C. 252(e)(6) gives district courts jurisdiction to review state commission decisions interpreting and enforcing previously approved interconnection agreements. Pet. App. 28a-29a. The court therefore did not consider whether jurisdiction also existed under 28 U.S.C. 1331. Pet. App. 29a & n.3. In addition, the court held that the commissioners were not entitled to

Eleventh Amendment immunity from Ameritech's action for two reasons: first, the court held that a state commission waives its Eleventh Amendment immunity by voluntarily participating in the federal regulatory scheme created by the 1996 Act; and, second, the court held that the doctrine of *Ex parte Young* permits official capacity actions against state commissioners seeking prospective relief from ongoing violations of the 1996 Act. *Id.* at 30a.

The district court upheld the ICC's decision on the merits in a separate opinion. *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, No. 98-C-1925, 1998 WL 419493 (N.D. Ill. July 23, 1998).

4. The United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 6a-22a.[2]

First, the court of appeals held that the ICC commissioners were not immune under the Eleventh Amendment from Ameritech's suit. The court reasoned that state commissions waive their Eleventh Amendment immunity by electing to exercise regulatory authority under the 1996 Act. Pet. App. 12a-13a (citing *MCI Telecomms. Corp.* v. *Illinois Commerce Comm'n*, 168 F.3d 315 (1999), modified on reh'g, 222 F.3d 323 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001)).

Second, the court of appeals held that the district court had jurisdiction under 47 U.S.C. 252(e)(6) to review the ICC's decision construing and enforcing the interconnection agreements between Ameritech and its competitors. The court reasoned that Section 252(e)(6)

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[2] While noting that its jurisdiction over the ICC's appeal was "somewhat problematic" because the district court decided the merits before reaching the ICC's jurisdictional defense, the Seventh Circuit concluded that those "formal defects" did not preclude appellate jurisdiction. Pet. App. 11a-12a.

"provides for judicial review of 'state commission actions,' not simply review of 'interconnection agreements.'" Pet. App. 13a-14a (citing *MCI*, 168 F.3d at 320). The court nonetheless noted that Section 252(e)(6) authorizes judicial review of commission actions only for compliance with federal law. *Id.* at 15a.

Finally, the court of appeals held that the ICC's underlying decision with respect to reciprocal compensation for ISP calls "does not violate the [1996] Act or the FCC's interpretation of the Act." Pet. App. 20a.[3]

SUMMARY OF ARGUMENT

This Court has recognized that, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). Congress allowed the States, through their public utility commissions, to elect to play a role in that regulation, but only as a part of a regime that explicitly provided for federal judicial review of their actions to ensure compliance with the new federal standards. With respect to the core local competition obligations

[3] Because the court of appeals affirmed the ICC's underlying ruling on the merits, there is a question as to petitioners' standing to seek review of the court's jurisdictional and Eleventh Amendment holdings. See U.S. Pet. 14, *United States* v. *Public Service Comm'n of Md.*, No. 00-1711 (identifying that standing concern in petition seeking review of the Fourth Circuit's decision in *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d 279 (2001)). The petitions for certiorari filed by the United States and Verizon Maryland Inc. in the Fourth Circuit case present the three questions that are presented in this case, as well as an additional question of jurisdiction under 28 U.S.C. 1331. The Court granted those petitions limited to the Section 1331 question. 121 S. Ct. 2448 (2001). No standing concerns exist in the Fourth Circuit case.

imposed by Sections 251 and 252, the 1996 Act does not allow the state commissions to exercise federal regulatory authority without federal judicial oversight. Thus, whether a state commission is approving or rejecting a new interconnection agreement, or is interpreting or enforcing an agreement already in effect, this Court's observation in *Iowa Utilities Board* holds true: "[I]f the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." 525 U.S. at 379 n.6.

I. Petitioners do not dispute that Congress vested the federal district courts with jurisdiction—indeed, exclusive jurisdiction—to review state commissions' decisions approving or rejecting interconnection agreements for compliance with the 1996 Act. Petitioners contend, however, that Congress did not also intend the district courts to exercise jurisdiction to ensure that, when state commissions subsequently construe and enforce such interconnection agreements, they do so consistently with the Act. Petitioners' position, which has been rejected by four of the five courts of appeals that have considered it, should be rejected by this Court as well.

Congress made clear in Section 252(e)(6) of the 1996 Act that "any case in which a State commission makes a determination under this section [*i.e.*, Section 252]" is reviewable in district court for compliance with the Act. 47 U.S.C. 252(e)(6). A state commission "makes a determination under" Section 252 not only when it approves or rejects a new interconnection agreement, but also when it construes or enforces an existing agreement, because a state commission's authority to regulate such agreements under the new federal regulatory regime established by the Act derives from Section 252.

A contrary conclusion is not suggested by the fact that Section 252 expressly prescribes standards to govern the state commissions' review of interconnection agreements only at the initial approval stage. Congress would have understood that a state commission's authority to approve an interconnection agreement necessarily includes the authority to construe and enforce the agreement, both at the time that the agreement is submitted for the commission's approval and at subsequent times when disputes arise between the parties concerning the application of the agreement in a particular context. Indeed, a state commission's authority to assess whether an agreement meets the requirements of the 1996 Act would be illusory if the commission could not assure that the agreement continued to meet those requirements in its performance. Moreover, in a companion provision of the Act, Congress expressly precluded state court review of state commission decisions "approving or rejecting an agreement." 47 U.S.C. 252(e)(4). Presumably, Congress would have used the same language in Section 252(e)(6) had it intended to authorize federal judicial review *only* of those decisions, and not of decisions construing or enforcing agreements.

The FCC, too, has concluded that a state commission's authority under Section 252 is not limited to the initial approval or rejection of interconnection agreements. In construing a provision of the 1996 Act that authorizes the FCC to assume jurisdiction when a state commission declines to "carry out its responsibility under [Section 252]," 47 U.S.C. 252(e)(5), the FCC determined that a state commission exercises "responsibility under" Section 252 when it construes and enforces an existing interconnection agreement. *In re: Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Comm'n Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11,277 (2000). The FCC's understanding of the scope of Section 252 is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

Petitioners' contrary interpretation of the 1996 Act would produce a curious, confusing, and easily manipulatable regulatory regime, under which identical issues of federal law could be resolved only in federal court, or only in state court, based solely on the fortuity of when the issue arose. Such an approach would inject additional uncertainty into dealings between competing carriers and, in some instances, could encourage carriers to defer raising issues of interpretation until after an agreement was approved. Nothing in the text of Section 252(e)(6), or any other provision of the Act, suggests, much less compels, such an inherently problematic result.

II. State public utility commissions and their commissioners are not immune under the Eleventh Amendment from suits, such as this one, challenging their determinations with respect to interconnection agreements under the 1996 Act. That is the case for two independently sufficient reasons—one or both of which have been accepted by four of the five courts of appeals that have considered the question.

A. Congress conditioned the States' exercise of regulatory authority under the 1996 Act—authority that Congress was under no obligation to grant and the States are under no obligation to accept—on the States' waiver of their Eleventh Amendment immunity from suits in federal court to review their exercise of that authority. This Court recently confirmed that Congress may condition a federal "gratuity"—*i.e.*, some

economic or other benefit that Congress is free to withhold—on the recipient State's waiver of its sovereign immunity from suits involving that gratuity. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). Congress took an analogous approach here by giving the States the opportunity voluntarily to participate in an integrated regulatory regime involving both authority and reviewability in federal court of exercises of such authority.

As this Court has recognized, the 1996 Act transformed the regulation of local telecommunications competition, imposing a new federal regulatory regime in an area that previously was regulated by the individual States. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. Congress allowed the States, through their state commissions, to play a role in the new regime, but only as part of a scheme that explicitly contemplates review of their actions to ensure compliance with federal standards. Congress left the States free to decline that regulatory role—as one State has done—and to leave the role to be performed by the FCC instead. Accordingly, by voluntarily exercising regulatory authority under the 1996 Act to approve, reject, interpret, or enforce interconnection agreements, a State impliedly waives its sovereign immunity from suits challenging the manner in which it exercises that authority.

Contrary to petitioners' contention, the 1996 Act sufficiently put the States on notice of the condition attached to Congress's offer of federal regulatory authority. Section 252(e)(6), which authorizes federal court "[r]eview of State commission actions" under the Act, is most naturally read as providing for such review in actions against state commissions. Section 252(e)(6)

declares that, "[i]n *any* case in which a State commission makes a determination under [Section 252)," review is available in federal district court to "*any* party aggrieved by such determination." 47 U.S.C. 252(e)(6) (emphasis added). In order to assure that judicial review is available to "any [aggrieved] party" in "any case," Section 252(e)(6) must be understood as authorizing proceedings against state commissions, because in some categories of cases there may be no party to defend the challenged determination in federal court other than the state commission. Moreover, Congress would have understood that, in a proceeding to review the FCC's exercise of regulatory authority under the Act, the FCC and the United States necessarily would be parties. See 28 U.S.C. 2344; Fed. R. App. P. 15(a). Congress surely intended that, in an analogous proceeding to review state commissions' exercise of regulatory authority under the Act, state commissions would be parties.

Petitioners also suggest that Congress's grant of federal regulatory authority to the States in the 1996 Act is not properly characterized as a "gift" under *College Savings Bank*, because the States, rather than the United States, previously had regulated most aspects of local telecommunications. But such arguments ignore the fundamental change in local telecommuniations regulation wrought by the 1996 Act. Congress, acting within its constitutional authority to regulate commerce, could have preempted all state regulation in areas encompassed by the Act. Consequently, Congress also could give States the choice whether to exercise new federal regulatory power that they would not otherwise possess and could condition that choice on compliance with the requirements of the Act, including a waiver of sovereign immunity.

B. In any event, because this is a suit against the individual ICC commissioners in their official capacities to enjoin their enforcement of an order that assertedly violates the 1996 Act, the suit is not barred by the Eleventh Amendment for an additional reason. Under the exception to the States' Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), the federal courts may adjudicate suits against state officers in their official capacities to secure their prospective compliance with federal law. This Court has repeatedly reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997).

There is no merit to petitioners' contention that the *Ex parte Young* exception is unavailable in this case under the rationale of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). This case is unlike *Seminole Tribe* in all relevant respects. The 1996 Act does not create its own "carefully crafted and intricate remedial scheme," *id.* at 73-74, under which parties may challenge the determinations of state commissions with regard to interconnection agreements. There is consequently no reason in this case, as there was in *Seminole Tribe*, to foreclose the use of a judicially crafted remedial scheme under *Ex parte Young*.

ARGUMENT

I. FEDERAL COURTS HAVE JURISDICTION TO REVIEW DECISIONS BY STATE COMMISSIONS INTERPRETING OR ENFORCING PREVIOUSLY APPROVED INTERCONNECTION AGREEMENTS

A. Section 252(e)(6), titled "Review of State commission actions," authorizes federal district courts to exercise jurisdiction over "any case in which a State commission makes a determination under this section,"

i.e., Section 252. 7 U.S.C. 252(e)(6). Section 252(e)(6) further provides that "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." *Ibid.*[4] Section 252(e)(6) does not, by its terms, confine federal judicial review to state commission actions approving or rejecting interconnection agreements as an initial matter. It instead authorizes federal judicial review of *all* state commission "determination[s]" with respect to interconnection agreements for compliance with the local competition provisions of the 1996 Act—not only determinations concerning the approval or rejection of new agreements, but also determinations concerning the interpretation or enforcement of existing agreements.

It should be emphasized at the outset that interconnection agreements are, to a significant extent, creatures of federal law. Congress required incumbent local exchange carriers and potential competitors to negotiate interconnection agreements in good faith. See 47 U.S.C. 251(c)(1). Congress also provided for compulsory arbitration if the negotiations fail, see 47 U.S.C. 252(b); prescribed the subjects to be addressed by interconnection agreements, see, *e.g.*, 47 U.S.C. 251(b) and (c); and established standards—and directed the FCC to establish standards—with regard to the

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[4] If the state commission has declined to act, and the FCC has assumed regulatory responsibility pursuant to Section 252(e)(5), federal court review of the FCC's orders is available under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, and the FCC proceeding and "judicial review of the [FCC]'s actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. 252(e)(6).

content of those agreements, see, *e.g.*, 47 U.S.C. 251(d)(2), 252(d).[5]

Congress would thus have known that issues of federal law (*i.e.*, compliance with Sections 251 and 252 and the FCC's regulations promulgated thereunder) would arise not only at the time that an interconnection agreement was negotiated or arbitrated, but also during the term of the agreement as the parties disagreed about the meaning of a given provision and the state commission was called upon to resolve the disagreement. Indeed, state commission determinations that interpret and give effect to existing agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act. Congress could not have intended to foreclose federal court review of claims by an aggrieved carrier that a state commission has interpreted or enforced an

[5] The 1996 Act provides that carriers may enter into a negotiated interconnection agreement "without regard to" the requirements of Sections 251 and 252(d). 47 U.S.C. 252(a)(1). As a practical matter, however, negotiated agreements ordinarily incorporate those requirements to the same extent as arbitrated agreements because, if one party does not agree to such a requirement in negotiations, the other party can demand arbitration by the state commission to impose the requirement. 47 U.S.C. 252(b)(1). Moreover, an incumbent has an incentive not to agree in negotiations to terms more favorable than those required by Sections 251 and 252(d), because non-party carriers then are entitled to demand the same terms from the incumbent. 47 U.S.C. 252(i). See *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecommunications, Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) (noting that "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act").

existing agreement in a manner inconsistent with federal law.[6]

Petitioners' contrary approach would produce a curious, confusing, and easily manipulatable regulatory regime in which two different judicial systems were assigned interrelated but mutually exclusive tasks of reviewing state commission decisions on identical issues. Such issues could be resolved only in federal court, or only in state court, based solely on the fortuity of when the issue arose—in federal court if the issue arose at the formation of the agreement, but in state court if the issue arose during the term of the agreement. A party could evade federal court review (except potentially by this Court) simply by waiting to raise an issue until after an agreement was approved. There is no indication in the language of Section 252(e)(6), or any other provision of the 1996 Act, that federal court review depends upon the timing of a claim rather than its substance, or that Congress would have intended such a manifestly irrational system.

B. Petitioners principally contend (Br. 16-20) that state commission decisions interpreting or enforcing interconnection agreements are not reviewable in

[6] Petitioners acknowledge (Br. 24) that, because different issues of interpretation may arise at different times over the term of an interconnection agreement, "interpretation cases will likely represent the great bulk of litigation regarding interconnection agreements." It is particularly understandable, given the rapidity of technological change within the telecommunications industry, that important interpretive issues may not arise until an agreement has been in place for some time. For example, the underlying issue in this proceeding—whether federal law requires that reciprocal compensation be paid on calls to ISPs—has become increasingly important to carriers over the years as more of their customers have sought access to the Internet.

federal district court because they are not "determination[s] under this section" within the meaning of Section 252(e)(6). Petitioners are mistaken.

Petitioners concede, as they must, that a state commission acts "under" Section 252 when it approves or rejects an interconnection agreement as an initial matter. The authority to approve or reject an interconnection agreement necessarily includes the authority to determine what the agreement is. That authority may be exercised not only when an agreement is initially presented to a state commission for its approval, but also when disputes subsequently arise between the parties about the application of the agreement in a particular context.

An implicit condition of a state commission's approval of any interconnection agreement is that the parties will carry out the agreement in accordance with the commission's understanding of its terms. Otherwise, the commission's determination that an agreement does not discriminate against non-party carriers, serves the public interest, convenience, and necessity, and complies with Sections 251 and 252, see 47 U.S.C. 252(e)(2), could become meaningless. That condition contemplates that the commission may later be called upon to clarify what the agreement provides. Such determinations, although separate in time from the commission's initial approval of the agreement, are nonetheless incident to that approval and may be indistinguishable in substance from determinations made at the initial approval stage. Indeed, they are precisely the same determinations that the commission could have made at that earlier stage if the parties and the commission had foreseen the dispute that would arise as to the meaning

of the agreement.[7] Accordingly, whether or not an interconnection agreement has already taken effect, a state commission makes a "determination" under Section 252 when it declares what the agreement is.[8]

It is for such reasons that every court of appeals that has addressed the question, with the exception of the Fourth Circuit, has held that, when a state commission interprets or enforces an existing interconnection agreement, the commission makes a "determination under [Section 252]." See, *e.g.*, *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000) ("A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission."), cert. denied, 121 S. Ct. 896 (2001); accord *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-497 (10th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-480 (5th Cir. 2000); but see *Bell Atlantic MD, Inc.* v. *MCI*

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[7] Cf. *Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992) (deferring to EPA's understanding of the meaning of EPA-approved state water quality requirements in the context of resolution of an interstate compliance dispute).

[8] The ICC itself acknowledged in this proceeding that Section 252 is a source—although, in the ICC's view, not the only source — of its authority to interpret and enforce interconnection agreements. See J.A. 112a (asserting jurisdiction under Section 252 and state law).

WorldCom, Inc., 240 F.3d 279, 301-307 (4th Cir.), cert. granted, 121 S. Ct. 2448 (2001) (Nos. 00-1531, 00-1711).[9]

The FCC has also concluded that state commissions act under Section 252 when they interpret or enforce existing interconnection agreements. See *In re: Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Comm'n Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11,277 (2000). There, a state commission (unlike the ICC in this case) declined to exercise regulatory authority to construe a provision of an existing interconnection agreement concerning reciprocal compensation. The FCC assumed regulatory authority over the dispute, pursuant to Section 252(e)(5), on the ground that the state commission had

[9] The Fourth Circuit suggested that a state commission does not act under Section 252 when it construes an existing interconnection agreement that was negotiated between the parties (as was the agreement in this case), because Section 252 authorizes state commission to review such agreements as an initial matter only to assure that they are consistent with the public interest, convenience, and necessity and do not discriminate against non-party carriers. See *Bell Atlantic*, 240 F.3d at 302-303. But whether a state commission is evaluating a negotiated agreement under the standards of Section 252(e)(2)(A) or an arbitrated agreement under the standards of Section 252(e)(2)(B), the state commission first has to decide what the agreement is. The state commission's resolution of antecedent questions concerning the meaning of the agreement is thus a necessary component of its "determination under [Section 252]." And, where the state commission clarifies the meaning of an agreement previously approved under the standards of Section 252(e)(2)(A) or (B), the commission is likewise acting under Section 252. The mere fact that the commission announces its interpretation after, rather than at the same time as, its initial approval of the agreement does not detract from the status of that interpretation as a "determination under [Section 252]."

declined to "'carry out its responsibility' under section 252." *Id.* (para. 6). The FCC thus determined that a state commission's "'responsibility' under section 252" includes "interpret[ing] and enforc[ing] existing interconnection agreements." *Ibid.*[10] Because the FCC's interpretation of the 1996 Act is eminently reasonable, it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). See *Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications*, 225 F.3d at 946.[11]

C. Petitioners next contend (Br. 19) that Section 252(e)(4), which declares that "[n]o State court shall

[10] The Fourth Circuit attempted to distinguish *Starpower* on the ground that Section 252(e)(5) refers to a state commission's "responsibility under this section [*i.e.*, Section 252]" whereas Section 252(e)(6) refers to a state commission's "determination under this section [*i.e.*, Section 252]." See *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 303 n.6. The difference in terminology, to the extent it has any significance at all, is a consequence of the fact that Section 252(e)(5) is concerned with the activities of state commissions, whereas Section 252(e)(6) is concerned with the end products of those activities. But that difference in terminology does not detract from the relevance of *Starpower* to the question here. *Starpower* makes clear that a state commission exercises "responsibility under" Section 252 when it construes or enforces an existing interconnection agreement. It thus follows that the state commission's resulting determination with respect to how the agreement is to be construed or enforced is a "determination under" Section 252.

[11] The FCC's conclusions in *Starpower* concerning the source of state commissions' authority to interpret and enforce existing interconnection agreements qualify for deference under *Chevron*, because Congress delegated authority to the FCC to make rules carrying the force of law in this area, see 47 U.S.C. 251(d)(1), and the interpretation at issue was promulgated in a preemption proceeding mandated by Congress, see 47 U.S.C. 252(e)(5). Cf. *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001).

have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section," implies that Congress contemplated that state courts *would* have jurisdiction to review state commissions' orders with respect to existing agreements. It does not follow, simply because Congress did not expressly foreclose state court review of state commission decisions interpreting or enforcing agreements that were previously approved, that Congress intended to confine federal court review to state commission decisions approving or rejecting agreements as an initial matter. Nothing in the text of Section 252(e)(4), Section 252(e)(6), or any other provision of the 1996 Act hints at such an intent.

To the contrary, Section 252(e)(4) manifestly undermines petitioners' position here. Section 252(e)(4) demonstrates that, when Congress intended to refer *only* to decisions of state commissions "approving or rejecting an agreement," Congress did so in those unequivocal terms. Congress did not use those same terms in describing the scope of federal court review under Section 252(e)(6). Instead, Congress chose more expansive language—providing for federal court review in "*any* case in which a State commission makes a determination under this section"—and its choice should be given significance. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Thus, although Congress did not expressly preclude state court review of state commission orders interpreting or enforcing interconnection agreements, Congress also did not confine federal court review under

Section 252(e)(6) to state commission orders approving or rejecting agreements as an initial matter. Rather, Congress used language that encompasses decisions interpreting or enforcing agreements already in existence.

Congress may have concluded that state court review of state commission orders interpreting or enforcing interconnection agreements should not be entirely foreclosed because, in some cases, the order might turn on issues of state statutory or common law. Cf. 47 U.S.C. 252(e)(3) (state commission may enforce certain state-law requirements in review of interconnection agreements). Congress may have sought to give carriers the option of seeking review of such orders in either federal court or state court, depending upon whether, among other things, the order implicates predominantly federal-law or state-law claims. Of course, if a case presenting both federal-law claims and state-law claims were to be brought in state court, a defendant would ordinarily have the option to remove the case to federal court, at least for the adjudication of any federal-law claims. See 28 U.S.C. 1441.

In any event, the question here is not, as petitioners suggest (Br. 19), whether Congress "intend[ed] to preclude customary state court review of * * * determinations made by state commissions * * * interpreting and enforcing agreements." Rather, the question is whether Congress intended to preclude *federal* court review of such determinations for compliance with federal law. Congress evinced no such intent. The Court is not required to decide in this case whether, or to what extent, state courts may exercise concurrent jurisdiction to review orders of the sort at issue here.

D. Petitioners note (Br. 19) that federal judicial review under Section 252(e)(6) is addressed "to deter-

min[ing] whether the agreement * * * meets the requirements of section 251 of this title and this section [*i.e.*, Section 252]," and argue that a district court is not engaging in that inquiry when it reviews a state commission's order interpreting or enforcing an existing agreement. Again, petitioners are mistaken.

Although, as petitioners observe (*ibid.*), federal judicial review for compliance with Sections 251 and 252 "should occur at the time the agreement is approved," subsequent disputes concerning the interpretation and enforcement of the agreement also must be resolved in compliance with Sections 251 and 252. Thus, when a state commission construes a provision of an existing agreement, and an aggrieved party seeks judicial review under Section 252(e)(6) on the ground that the construction is inconsistent with the 1996 Act (as Ameritech did in this case), the district court is being asked to "determine whether the agreement," as so construed and applied, "meets the requirements of" Sections 251 and 252.[12]

E. Petitioners argue (Br. 24) that Congress would not have seen any need for state commissions' orders interpreting and enforcing interconnection agreements to be reviewed in federal court for consistency with federal law. To the contrary, Congress surely understood that federal court review serves an important

[12] Alternatively, when a state commission construes a disputed provision of an existing interconnection agreement, the commission might be viewed as "approving" a new agreement between the parties (*i.e.*, the existing agreement as it is newly understood and clarified), thereby making federal review available even under petitioners' restrictive understanding of Section 252(e)(6). That understanding would not necessarily require a construction of Section 252(e)(4) that ousts the state courts of jurisdiction to review state commission decisions construing existing agreements.

purpose: to promote the development and application of a more consistent body of federal law to govern the rights and obligations of parties under interconnection agreements. After all, Congress assigned the federal courts exclusive responsibility for reviewing state commission decisions approving or rejecting interconnection agreements in the first instance. And the same issues of federal law that arise at the approval/rejection stage also arise at the interpretation/enforcement stage. Congress could not have intended to leave the federal courts powerless to review the determinations of state commissions, in the course of interpreting or enforcing interconnection agreements, to assure that those decisions do not conflict with federal law or significantly alter the terms of agreements approved in the federal courts' initial review. See *Brooks Fiber Communications*, 235 F.3d at 497 (observing that Congress would not have created a regime under which "certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved").

As a practical matter, inconsistent decisions from the federal and state courts on the same, or similar, issues of federal law—or even the possibility of such inconsistent decisions—could significantly impede the interconnection process envisioned by the 1996 Act.[13] State

[13] To be sure, if the state courts possess concurrent jurisdiction with the federal courts to review state commission orders interpreting or enforcing interconnection agreements (a question not presented here), some potential exists for inconsistent decisions. But state courts ordinarily would decide cases challenging such state commission orders on federal-law grounds only when the plaintiffs chose to file the case in state court and the defendants chose not to remove the case to federal court under 28 U.S.C. 1441.

regulators could be torn between conflicting decisions of the state and federal courts on the same issue of federal law in attempting to carry out their responsibilities under the 1996 Act. And telecommunication carriers could face greater uncertainty, and thus potentially greater cost, in entering into interconnection agreements. Parties to such agreements could be tempted, for example, to engage in regulatory gamesmanship by waiting to raise critical issues until after an agreement has been approved. Accordingly, federal court review of state commission determinations interpreting and enforcing interconnection agreements for compliance with federal law not only comports with the statutory text but also advances Congress's overriding purpose to facilitate the expeditious development of competition in local telecommunications markets.[14]

F. Finally, whether or not Section 252(e)(6) vests the district courts with jurisdiction to review state commission orders interpreting and enforcing existing interconnection agreements for compliance with federal

[14] As a last resort, petitioners contend (Br. 27-28) that Section 252(e)(6) "should be read to confine federal court review to arbitration and approval decisions to avoid the difficult Eleventh Amendment questions raised by this case." As explained below, the canon of constitutional avoidance has no application in this case because construing Section 252(e)(6) to authorize suits against state commissions or their commissioners does not present serious Eleventh Amendment problems. In any event, the Court could not long avoid the Eleventh Amendment question, which also arises with respect to federal court challenges to state commission decisions approving or rejecting interconnection agreements, which petitioners concede are within the scope of Section 252(e)(6). See, *e.g.*, *AT&T Communications* v. *BellSouth Telecomms.*, 238 F.3d 636 (5th Cir. 2001); *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001).

law, the district courts possess such jurisdiction under 28 U.S.C. 1331. As noted above, Ameritech invoked the district court's jurisdiction pursuant to both provisions. Although neither the district court nor the Seventh Circuit found it necessary to address the question (see Pet App. 24a, 29a n.3), Section 1331 remains available as an alternate basis for federal jurisdiction in this context. Because the Court did not grant certiorari on that question in this case, we have addressed the question in our brief in *Verizon* v. *Public Service Comm'n of Maryland*, No. 00-1531 (consolidated with *United States* v. *Public Service Comm'n of Maryland*, No 00-1711).

II. THE ELEVENTH AMENDMENT DOES NOT BAR SUITS AGAINST STATE COMMISSIONS OR THEIR COMMISSIONERS SEEKING PROSPECTIVE RELIEF FROM THEIR DETERMINATIONS UNDER THE 1996 ACT

State public utility commissions and their commissioners are not entitled to Eleventh Amendment immunity from suits, such as this one, seeking review of their orders approving, rejecting, construing, or enforcing interconnection agreements under the 1996 Act. That is so for two independent reasons. First, a State waives its immunity from suit in federal court under the 1996 Act by electing to participate in the regulatory scheme established by the Act. Second, the doctrine of *Ex parte Young* permits suits against state commissioners in their official capacities to secure their prospective compliance with the 1996 Act.

It should be emphasized that the only remedy available in federal court to a party aggrieved by a state commission order under Section 252 is a judicial

determination that the order is contrary to federal law and therefore is unenforceable. The same remedy is available to a party aggrieved by an order issued by the FCC under Section 252 in circumstances where the State has elected not to exercise regulatory authority under the 1996 Act. The aggrieved party cannot, in either instance, obtain monetary relief against the State or the United States. A state commission's obligation to appear in federal court to defend a Section 252 determination—the same obligation that is imposed on the FCC—does not constitute a significant intrusion into state sovereignty, especially given that the States can avoid that obligation altogether by electing to leave the exercise of regulatory authority under the 1996 Act to the FCC.[15]

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[15] Even if the Eleventh Amendment were a bar to suits under the 1996 Act against state commissions or their commissioners, state commissions' decisions approving, rejecting, construing, or enforcing interconnection agreements would be reviewable in federal court for compliance with federal law, so long as sufficient adversariness existed between the private parties to create an Article III case or controversy. Cf. pp. 35-36, *infra* (describing instances in which such adversariness between private parties may not exist). Those private parties would be required by principles of claim and issue preclusion to give effect to the federal court's decision in the case. A state commission could be expected to give effect to the decision as well. If a state commission nonetheless refused to do so, the question whether an injunction could issue against the commissioners in an action under *Ex parte Young* is distinct from the *Ex parte Young* question presented in this case.

A. Congress Conditioned The States' Participation In The New Regulatory Scheme Created By The 1996 Act On The States' Waiver Of Immunity From Suits Challenging Their Determinations Under The Act

1. This Court has recognized that, as a condition for a grant of federal authority to a State, Congress may require the State to waive its immunity from suit with respect to its exercise of that authority. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959); see also *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999) (discussing *Petty*). That is what Congress did in the 1996 Act. Congress invited the States to participate, if they chose to do so, in the federal regulatory scheme established by the Act. Congress conditioned such participation, however, on the States' acceptance of a reguatory regime that specifically made their determinations under the Act subject to review in federal court. Accordingly, when Illinois accepted Congress's invitation to regulate under the Act—which Illinois was free to decline—Illinois waived the ICC's immunity from suits such as this one.

In *Petty*, Congress consented to a compact between two States to engage in the construction of bridges and the operation of ferries across navigable waters of the United States. Congress, in the Act approving the compact, attached a condition that "nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of * * * any court * * * of the United States over or in regard to any navigable waters or any commerce between the States." 359 U.S. at 281. The Court construed that provision, read in light of a "sue-and-be-sued" provision in the compact itself, as "reserv[ing] the jurisdiction of

the federal courts to act in any matter arising under the compact," including tort suits against an agency of the two States that was formed pursuant to the compact. *Ibid.* The Court explained that "[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id.* at 281-282.

Three Terms ago, the Court reaffirmed its holding in *Petty* that the compacting States "had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Savings Bank*, 527 U.S. at 686. The Court described *Petty* as involving Congress's attachment of a condition to a grant of authority that the States would not otherwise have possessed, because the Constitution prohibits States from entering into compacts with one another without congressional approval. *Ibid.* Thus, the Court explained, Congress's approval of the grant of authority contained in the compact in *Petty* was a "gratuity" in the same sense as a grant of federal funds—a context in which it is well-established that Congress may condition a State's acceptance of the gratuity on a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (holding that Congress could condition a grant of federal funds to the States upon the States' taking certain actions that Congress could not require them to take)).[16]

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[16] *College Savings Bank* confirms that a voluntary waiver, based on a State's acceptance of a federal gratuity that is conditioned on the State's consent to suit in federal court, is wholly distinct from a forced waiver under the now-overruled doctrine of *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964). See *College Savings Bank*, 527 U.S. at 675-687.

This case involves a condition attached to Congress's provision of a "gratuity"—a grant of authority that a State may choose to accept or reject—analogous to the condition attached to Congress's approval of the interstate compact in *Petty*. As this Court observed in *Iowa Utilities Board*, the 1996 Act transformed the regulation of local telecommunications, because "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." 525 U.S. at 379 n.6; see *AT&T Communications* v. *BellSouth Telecommunications, Inc.*, 238 F.3d 636, 646 (5th Cir. 2001) ("After passage of the 1996 Act, regulation of competition among providers of local phone service is no longer within the province of states' inherent authority."). Congress allowed the States, through their public utility commissions, to play a role in that regulation, but only pursuant to a regulatory regime that explicitly provides that exercises of that authority are subject to review in federal court to ensure that they comply with the new federal standards. Congress left the States free to decline that regulatory role, in which case the role would be performed by the FCC. See 47 U.S.C. 252(e)(5). Thus, with respect to the core local competition obligations imposed by Sections 251 and 252, the 1996 Act does not allow the States simply "to do their own thing," and, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6.

Three courts of appeals, applying the implied waiver doctrine recognized in *Petty* and *College Savings Bank*, have held that States, by electing to exercise regulatory authority under the 1996 Act, waive their immunity from suits in federal court challenging their

exercise of that authority. See *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d at 646-647; *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 341; *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001); but see *Bell Atlantic Maryland, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 290-294 (rejecting implied waiver argument).

2. Petitioners contend (Br. 30-33) that the 1996 Act does not contain a sufficiently clear statement that state commissions will be subject to suit in federal court if they choose to exercise regulatory authority under the Act. Petitioners are mistaken. Section 252(e)(6), read in context with other provisions of Section 252, puts state commissions on abundant notice that they, like the FCC, may be named as defendants in suits in federal court seeking review of their determinations under the Act. Cf. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 74 (2000) (analysis of whether Congress intended to abrogate States' sovereign immunity is to be based on the statutory text "[r]ead as a whole").

As noted above, Section 252(e)(6) is titled "[r]eview of State commission actions," and provides, in pertinent part, that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court." 47 U.S.C. 252(e)(6). Section 252(e)(6) does not state, in so many words, that such an action may be brought against the state commission. But that is the unmistakable implication of the statutory text. In *Petty*, the proviso that Congress attached to its approval of the interstate compact likewise did not expressly refer to suits against the bistate commission or to a waiver of the commission's sovereign immunity, see 359 U.S. at 277-

278, but the Court understood the proviso as addressing such a waiver, see *id.* at 281-282.

Indeed, Section 252(e)(6) must be read to authorize suits against state commissions in order to assure, as the statute provides, that federal judicial review is available to "*any* party aggrieved" and "[i]n *any* case in which a State commission makes a determination under this section." 47 U.S.C. 252(e)(6) (emphases added). There are some categories of cases seeking review of state commission determinations under Section 252 in which the *only* potential defendant is the state commission itself. For example, Section 252(e)(1) requires that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission," which "shall approve or reject the agreement, with written findings as to any deficiencies." 47 U.S.C. 252(e)(1); see also 47 U.S.C. 252(e)(2) (providing separate standards for state commissions' review of negotiated agreements and arbitrated agreements). Congress surely contemplated situations in which a state commission rejects a negotiated agreement—an agreement that is satisfactory in all respects to the parties—on the ground, for example, that the agreement "is not consistent with the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A)(ii). In such situations, both parties to the agreement would be "aggrieved by [the state commission's] determination," within the meaning of Section 252(e)(6), and thus would be entitled to seek review as plaintiffs in federal district court. The only possible defendant to that suit could be the state commission (especially if no other party had appeared in the state commission proceedings to urge rejection of the agreement). Similarly, where a state commission has rejected a Bell operating company's statement of

generally available terms under Section 252(f)(2), the only possible defendant in a suit by the Bell operating company under Section 252(e)(6) seeking review of that determination might well be the state commission.[17]

Moreover, Section 252(e)(6) contemplates "judicial review of the Commission's [*i.e.*, the FCC's] actions," acting in the place of a state commission, in a proceeding in federal court against the FCC and the United States. All final orders of the FCC are reviewable, unless otherwise specifically provided, in the federal courts of appeals under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* See 28 U.S.C. 2342(1); 47 U.S.C. 402(a); see also *In re Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, 16 F.C.C.R. 6231 (2001) (para. 15). The Hobbs Act states that any proceeding thereunder to review an agency order "shall be against the United States." 28 U.S.C. 2344; see also Fed. R. App. P. 15(a) (requiring petitions for review of federal agency orders to "name the agency as a respondent," and noting that the United States, whether or not named, is a respondent if required by statute). It would have been anomalous for Congress to provide that, although an order issued by the FCC under Section 252 is reviewable in a proceeding against the FCC itself, an order issued by a state commission under Section 252 is reviewable in federal court only in a proceeding against

[17] Petitioners acknowledge (Br. 18) that state commission decisions approving or rejecting interconnection agreements are reviewable in district court under Section 252(e)(6). But petitioners suggest no means by which such review could occur in cases, such as those identified in the text, where there is no party other than the state commission to defend the decision in district court.

private parties, if any exist, and not against the state commission. Thus, Section 252(e)(6) should be understood as providing for federal court review in a proceeding against whatever entity—the FCC or the state commission—issued the order approving, rejecting, construing, or enforcing an interconnection agreement.

3. Petitioners further contend (Br. 32-40) that the States cannot be deemed to have waived their Eleventh Amendment immunity with respect to judicial review proceedings under Section 252(e)(6) because the authority to regulate interconnection agreements is not a "gratuity" under this Court's decisions. Petitioners rely on the distinction that the Court drew in *College Savings Bank* between a requirement that a State waive its immunity in order to obtain a federal "gift or gratuity," such as the highway funds in *Dole* or the interstate compact in *Petty*, and a requirement that a State waive its immunity in order to engage in "otherwise permissible activity" in which private parties are free to engage, such as the interstate commercial activity in that case. 527 U.S. at 687. Petitioners suggest that, because the States exercised comprehensive regulatory authority over local telecommunications before the enactment of the 1996 Act, the regulation of interconnection agreement is such an "otherwise permissible activity," and thus that the States' participation in that activity cannot be conditioned on a waiver of immunity.

Petitioners overlook not only that Congress may preempt state regulatory authority over commercial activities that are within the federal commerce power but also that Congress did preempt such state regulatory authority here. As this Court made quite clear in *Iowa Utilities Board*, Congress has taken over significant aspects of local telecommunications regulation. See 525 U.S. at 379 n.6 ("With regard to the matters

addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States."); accord *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 342. The Act imposed a new federal regulatory scheme on local telecommunications markets; the States were permitted to continue to regulate in areas encompassed by the Act *only* to the extent consistent with the Act and the implementing FCC regulations, and *only* by accepting a regulatory regime in which state commission decisions were made reviewable in federal court. The Act thus reflects the general principle that Congress may preempt the States from regulating in an area of federal concern and may condition the States' continued regulation in that area on adherence to federal standards. See *Federal Energy Regulatory Comm'n* v. *Mississippi*, 456 U.S. 742, 767 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

Petitioners' contention (Br. 37-40) that they had no meaningful choice whether to accept Congress's invitation to exercise federal regulatory authority rests on a similarly flawed conception of the preemptive scope of the 1996 Act. Suggesting that a State would lose all ability to regulate local telecommunications if it declined to regulate under the Act, petitioners argue (Br. 39) that Illinois "should not have to choose between giving up the 'vital public service' performed by the ICC and 'consenting' to federal suit." Congress did not, however, put States to that choice. A State's decision not to exercise regulatory authority under Sections 251 and 252 does not divest the State of all regulatory authority over local telecommunications. Although Congress supplanted state regulation with respect to "matters addressed by the 1996 Act," *Iowa Utilities*

Board, 525 U.S. at 379 n.6, Congress did not supplant state regulation of all aspects of local telecommunications. The local competition provisions of the 1996 Act are concerned principally with dealings between telecommunications carriers, rather than with relations between each carrier and its own customers, which has been a traditional focus of state regulation. Moreover, Congress expressly preserved the ability of States to supplement federal requirements with requirements of their own, so long as they are consistent with the Act and any rules promulgated thereunder by the FCC. See 47 U.S.C. 251(d)(3), 252(e)(3), 253(b), 261(b) and (c). The States thus retain considerable regulatory authority with respect to local telecommunications, whether or not they choose to participate in the federal scheme established by the 1996 Act.[18]

Nor is it relevant, as petitioners suggest (Br. 37), that a state commission may have been required by state law to accept Congress's invitation to regulate interconnection agreements. The relevant point is that Congress left it to the States to choose whether to exercise regulatory authority under the 1996 Act. It makes no difference for Eleventh Amendment purposes whether that choice was made by the state legislature or the state commission. In either circumstance, it is not "the unilateral action of Congress" (Br. 38) that has brought the state commission or its commissioners to federal court, but rather the unilateral decision by the

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[18] The fact that Congress did not supplant state regulation of local telecommunications in every possible respect does not undermine the waiver analysis. Under that analysis, the States are deemed to have waived their sovereign immunity only with respect to those matters as to which Congress *has* supplanted state regulation with federal regulation.

State to accept the full regulatory authority offered by Congress.[19]

Indeed, one State—the Commonwealth of Virginia—has declined to exercise authority under the 1996 Act. See *In re Petition of Cox Virginia Telecommunications, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 F.C.C.R. 2321, 2322 (para. 4) (Jan. 26, 2001) (noting Virginia State Corporation Commission's refusal to exercise authority under the 1996 Act on grounds that doing so may be deemed a waiver of sovereign immunity); see also *Starpower*, 15 F.C.C.R. at 11,277 (FCC exercises regulatory authority under 1996 Act in the default of the Virginia Commission). Such action confirms that Congress left the States free to choose whether to participate in the new federal regulatory scheme, and that a State choosing to participate would know that it is waiving its Eleventh Amendment immunity from federal judicial review of state commission orders under the Act. Petitioners and other state commissioners may not like the choice that Congress offered under the Act, because they would prefer instead a return to the era when virtually all local telecommunications regulation was the sole

[19] Petitioners do not assert that Congress "coerced" them to regulate interconnection agreements in violation of the Tenth Amendment. See *Printz* v. *United States*, 521 U.S. 898 (1997). The lone court of appeals that has addressed that issue rejected a Tenth Amendment challenge to the 1996 Act, emphasizing that the state commission in that case "could have chosen not to participate," but instead arbitrated and reviewed the interconnection agreement at issue. See *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.), cert. denied, 531 U.S. 816 (2000).

domain of the States. See Pet. Br. 39 ("[u]tilities regulation is a long-standing function of state government in Illinois"). There can be no doubt, however, that Congress has offered the States a real choice, albeit a choice that carries with it burdens as well as benefits, and that the FCC will exercise regulatory authority under the 1996 Act if the States decline to do so. See 47 U.S.C. 252(e)(5).

In sum, it is the 1996 Act, not state law, that provides new entrants with the core rights to interconnect with an incumbent carrier's network, to lease elements of the incumbent's network, and to purchase services of the incumbent's network for resale. It is the 1996 Act, not state law, that provides for competing carriers to enter into agreements implementing those rights, either through negotiation between themselves or through arbitration under the auspices of a regulatory body. It is the 1996 Act, and the regulations promulgated by the FCC under that Act, that contain the basic principles governing the rates, terms, and conditions to be incorporated into such agreements. Thus, to the extent that Congress has preempted state regulation of interconnection agreements, such state regulation is not "otherwise permissible activity" under *College Savings Bank*. Instead, the invitation to participate in such regulation is a form of "gratuity" that Congress may offer with conditions attached. States remain free to accept or reject the regulatory role that Congress has offered to them under the Act. But States cannot choose to participate in the regulatory scheme established under the Act while rejecting the federal judicial review that is a critical part of the regulatory scheme.

B. State Commissioners Are Subject To Suit In Their Official Capacities Under The Doctrine Of *Ex Parte Young* To Secure Their Prospective Compliance With The 1996 Act

There is a second, independent reason why this action may, consistent with the Eleventh Amendment, proceed against petitioners in federal court. This is a suit against state officials, in their official capacities, to secure their prospective compliance with the 1996 Act. It thus comes within the *Ex parte Young* exception to the Eleventh Amendment.

1. This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not apply to suits that seek to enjoin individual state officials in their official capacities from enforcing state law that is contrary to federal law or otherwise from engaging in conduct that federal law prohibits. *Ex parte Young*, 209 U.S. 123 (1908); see *Board of Trustees* v. *Garrett*, 121 S. Ct. 955, 968 n.9 (2001) (noting that the Americans With Disabilities Act is enforceable against States "by private individuals in actions for injunctive relief under *Ex parte Young*"); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 102 (1984). As the Court has observed, the *Ex parte Young* exception is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst* 465 U.S. at 105 (internal quotation marks omitted); accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).

As the Seventh Circuit has observed, suits such as this one, which seek to enjoin state commissioners from enforcing orders asserted to be contrary to the 1996 Act, "fit squarely within the traditional framework of *Ex parte Young*." *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 345. In naming petitioners, all of the commissioners of the ICC, in their official capacities as parties in a suit seeking review of the ICC's determinations under the 1996 Act, Ameritech was seeking "to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." *Ibid.* That is the precise circumstance in which the *Ex parte Young* exception is appropriately employed. See *Coeur d'Alene Tribe*, 521 U.S. at 276-277 (opinion of Kennedy, J.) (*Ex parte Young* and its progeny teach "that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar").[20] Thus, every court of appeals that has addressed the question, with the exception of the Fourth Circuit, has held that *Ex parte Young* permits federal court review of state commission determinations for consistency with the 1996 Act. See, *e.g.*, *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.) (characterizing such a suit as "a straightforward *Ex parte Young* case"), cert. denied, 531 U.S. 816 (2000); see also *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d at 647-649; *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 345; *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d at

[20] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether an action may proceed against state officials under the *Ex parte Young* exception is "whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 521 U.S. at 296 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

939-940; but see *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 294-298 (rejecting *Ex parte Young* argument).[21]

2. Petitioners initially contend (Br. 42) that state commissioners "cannot be said to *violate* federal law," for purposes of the *Ex parte Young* exception, when they construe or enforce an interconnection agreement in a manner contrary to the 1996 Act. According to petitioners, so long as state officials act "within their jurisdiction" (*ibid.*) under state law, they cannot be subject to suit in federal court under *Ex parte Young*.

The rule suggested by petitioners would turn *Ex parte Young* on its head. Indeed, the *Ex parte Young* exception applies *only* to suits challenging acts by state officials in their "official capacities," and thus ordinarily to acts ostensibly within the scope of their authority under state law. *Ex parte Young* proceeds, however, on the principle (or legal fiction) that state officials act outside their authority under state law, and thus are not the State for Eleventh Amendment purposes, when they exercise that authority contrary to federal law. See *Ex parte Young*, 209 U.S. at 159-160 (a state officer is "stripped of his official or representative character"

[21] In holding that the *Ex parte Young* exception does not apply to suits contending that a state commission's determination with respect to an interconnection agreement violates the 1996 Act, the Fourth Circuit undertook an extensive inquiry into the merits of the plaintiff's challenge and ultimately concluded that the plaintiff could not "allege an ongoing violation of federal law." *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 297. The Fourth Circuit erred in conflating the threshold inquiry into the applicability of the *Ex parte Young* exception with the inquiry on the merits. The applicability of *Ex parte Young* does not depend on whether the challenge to the state officials' action will ultimately be successful.

when he acts contrary to "the supreme authority of the United States"); see also *Papasan* v. *Allain*, 478 U.S. 265, 276 (1986) (*Ex parte Young* is "based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity").[22]

Nothing in this Court's decision in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), on which petitioners rely, casts doubt on the availability of an *Ex parte Young* action in the circumstances here. *Larson* involved a suit against an officer of the United States, in his official capacity, to challenge an allegedly tortious act of his agency. The Court declined to hold that the United States' sovereign immunity does not bar such suits on a theory that federal officers necessarily act outside the scope of their federal authority when they commit common-law torts. See *id.* at 692-695. But the Court nonetheless acknowledged the principle of *Ex parte Young* that treats state officials as acting outside their state authority when they violate supreme federal law. See *id.* at 690-691. That principle derives from the Supremacy Clause of the Constitution. See, *e.g.*, *Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of

[22] The *Ex parte Young* exception applies where a state official's conduct is alleged to violate either the Constitution or a federal statute or regulation. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156-157 n.6 (1978); accord *Garrett*, 121 S. Ct. at 968 n.9; *Edelman* v. *Jordan*, 415 U.S. 651, 665-671 (1974); cf. *City of New York* v. *FCC*, 486 U.S. 57, 63-64 (1988) (federal regulation may preempt state regulation).

federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Neither the Supremacy Clause nor any other federal constitutional or statutory restraint on the federal officer's conduct was implicated in *Larson*.

3. Petitioners next contend (Br. 45-48) that the *Ex parte Young* exception is unavailable in this case under the rationale of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). This case is unlike *Seminole Tribe* in all relevant respects. The 1996 Act does not create its own "carefully crafted and intricate remedial scheme," *id.* at 73-74, under which parties may challenge the determinations of state commissions with regard to interconnection agreements. There is consequently no reason in this case, as there was in *Seminole Tribe*, to foreclose the use of a judicially crafted remedial scheme under *Ex parte Young*.

In *Seminole Tribe*, the Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, that established a framework for Tribes to negotiate gaming compacts with States. Under IGRA, the only judicial remedy for a State's failure to negotiate in good faith with a Tribe was an order directing the State and the Tribe to conclude a compact within 60 days; the only judicial remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its own proposed compact to a mediator; and the only judicial remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then promulgate regulations governing gaming on the Indian lands at issue. *Seminole Tribe*, 517 U.S. at 74. The Court reasoned that, "[b]y contrast with this quite modest set of sanctions" that Congress in IGRA had authorized federal

courts to provide against States, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Id.* at 75. The Court therefore held that Tribes could not seek to enforce their IGRA rights in suits against state officials under *Ex parte Young*, because such suits would enable the Tribes to obtain more expansive sanctions than the limited statutory remedies that Congress provided as part and parcel of the limited statutory rights conferred in IGRA. *Id.* at 74-76; cf. *Brown* v. *GSA*, 425 U.S. 820, 829-835 (1976) (Title VII's "careful blend" of remedies for discrimination in federal employment precludes more general federal statutory remedies).

There is no reason similarly to conclude that the availability of judicial review of state commission orders under *Ex parte Young* is at all inconsistent with the 1996 Act. Congress, while making clear that such orders are reviewable in federal court, see 47 U.S.C. 252(e)(6), did not prescribe any particular mechanisms to govern such review. Nor did Congress circumscribe the remedies available in a federal court proceeding challenging a state commission order under the Act. Congress thereby indicated that all of the remedies ordinarily available in federal court when state officials act in a manner contrary to federal law are available when state commissions issue orders contrary to the Act and the FCC's implementing regulations. There is no statutory basis whatsoever for precluding the normal operation of the *Ex parte Young* doctrine in this case.[23]

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[23] It is instructive to contrast the specificity with which Congress addressed the administrative stage of proceedings under the

4. Finally, petitioners assert (Br. 47-48) that allowing *Ex parte Young* review of state commissioners' decisions with respect to interconnection agreements is "an affront to the sovereignty of the State." Br. 47-48 (quoting the Fourth Circuit's decision in *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 298). The mere fact that state interests are implicated by an *Ex parte Young* action—which necessarily challenges the official acts of a State through its officials—is not the sort of "affront" that is sufficient to preclude such actions. See *Coeur d'Alene Tribe*, 521 U.S. at 269-270 (observing that *Ex parte Young* itself, like subsequent cases applying its "fictional distinction between the official and the State," "implicated substantial state interests"); *id.* at 278 (opinion of Kennedy, J.) ("Of course, the State's interests are almost always implicated to a certain extent in *Young* actions."). It is no more an "affront" than is the Supremacy Clause itself.[24]

1996 Act with the generality with which Congress addressed the judicial review stage. Compare 47 U.S.C. 252(a), (b), and (e)(1)-(2) with 47 U.S.C. 252(e)(6). It is irrelevant to the *Seminole Tribe* analysis whether the *administrative* scheme that precedes judicial review under the 1996 Act might be characterized as "carefully crafted and intricate," 517 U.S. at 73-74. The *Seminole Tribe* analysis is concerned with whether Congress has prescribed a scheme for *judicial review* that is so "intricate," and its remedies so circumscribed, as to compel the conclusion that Congress would not have intended judicial review also to be available under *Ex parte Young*. No such conclusion can be drawn from the 1996 Act.

[24] The commissioners of the ICC have long been accustomed to *Ex parte Young*-type suits challenging their actions as contrary to federal law. See, *e.g.*, *Natural Gas Pipeline Co. of Am.* v. *Slattery*, 302 U.S. 300 (1937); *City of Chicago* v. *Chicago Rapid Transit Co.*, 284 U.S. 577 (1931); *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587 (1926).

Nor do petitioners offer any reason to conclude that this case, as opposed to the many other cases in which review of state officials' acts under *Ex parte Young* has been recognized to be available, presents any distinct "affront" to state sovereignty.[25] Indeed, given that Congress expressly gave States the option not to regulate interconnection agreements under the 1996 Act, and to leave such regulation to the FCC instead, see 47 U.S.C. 252(e)(5), the States may readily avoid any "affront" occasioned by *Ex parte Young* review of state commission orders of the sort at issue here.

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[25] Last Term, for example, the Court acknowledged that a private party may sue under *Ex parte Young* to enjoin state officials from violating the requirements of Title I of the Americans With Disabilities Act of 1990, 104 Stat. 330, 42 U.S.C. 12111 *et seq.*, which, among other things, requires employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant [for employment] or an employee," 42 U.S.C. 12112(b)(5)(A). See *Garrett*, 121 S. Ct. at 968 n.9. An injunction mandating compliance with that requirement by state officials could have a significantly greater impact on the State's conduct of its affairs than an injunction barring state commissioners from enforcing an order construing an interconnection agreement in a manner inconsistent with the 1996 Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 00-878

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS AT&T COMMUNICATIONS OF ILLINOIS, INC. AND TELEPORT COMMUNICATIONS GROUP, INC.

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QUESTIONS PRESENTED

1. Whether a state commission's order that interprets or otherwise affects a previously approved "interconnection agreement" is a "determination under [section 252]" and thus reviewable in federal court under 47 U.S.C. § 252(e)(6).

2. Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

PARTIES TO THE PROCEEDING

Petitioners are Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, who are currently, and were at the time of the final order of the United States Court of Appeals for the Seventh Circuit denying rehearing (Pet. App. 1a-2a), the members of the Illinois Commerce Commission. At the time of the filing of the federal district court action in this case, the commissioners were Dan Miller, Richard Kolhauser, Ms. Kretschmer, Karl McDermott, and Brent Bohlen.

Respondents are: Illinois Bell Telephone Company d/b/a Ameritech Illinois; WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.; MCI Telecommunications Corp.; MCImetro Access Transmission Services, Inc.; Focal Communications Corp.; Teleport Communications Group, Inc. ("TCG"); and AT&T Communications of Illinois, Inc. ("AT&T").

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, respondents TCG and AT&T disclose that they are both wholly-owned subsidiaries of AT&T Corp. AT&T Corp. has no parent company. No publicly held company owns more than 10 percent of AT&T Corp.'s stock.

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STATEMENT OF THE CASE

In the Telecommunications Act of 1996, Congress enacted a new subchapter of the Communications Act that seeks rapidly to introduce competition into local telephone markets that heretofore had been intractable monopolies. 47 U.S.C. §§ 251-261. These provisions preempt all state laws that could have the "effect" of preventing any firm from offering competitive local services, and they further impose a series of federal duties on the incumbent local exchange carriers ("incumbent LECs") that require them to share certain of their network facilities with prospective competitors.

These federal duties are expressed in very general terms, and there is nominally a three-step process for translating the general duties into concrete and enforceable legal rights. First, the Federal Communications Commission ("FCC") issues regulations that define the federal duties with greater specificity. Second, any willing state commission (or the FCC) establishes "interconnection agreements" that further specify the details of these federal network sharing requirements between incumbent LECs and each carrier who requests interconnection. Third, in the course of the implementation of any one interconnection agreement, there are proceedings in which the terms of the "approved" interconnection agreement will be interpreted, clarified, superceded, or modified and in which the incumbent LECs' obligations are made still more concrete. Questions whether the incumbent LEC has violated the Act or the FCC's regulations arise during each of the three steps in the process.

The three stages in the definition and implementation of the LECs' obligations are not discrete, but substantially overlap, both substantively and temporally. For example, there are pending proceedings in which the FCC is considering further modifications of its regulations, in which state commissions are interpreting previously approved interconnection

agreements or resolving "open issues" under them, and in which state commissions are arbitrating or reviewing new interconnection agreements that would supplement or supercede the previously approved agreements. For this reason, the interconnection agreements that are at issue in this case all expressly provide that the state commission retains jurisdiction to resolve issues arising under the agreement and provide for modification of the agreements in response to changes in the FCC regulations or other governing law.

The Act imposes a federal duty on incumbent LECs to comply with both the terms of their federal interconnection agreements and the substantive requirements of the Act. §§ 251(c)(2)-(3).[1] The Act expressly gives injured persons a federal private right of action (in either federal court or at the FCC) against an incumbent LEC who violates these or any other requirements of the statute. §§ 206-209. Because Congress invited individual state commissions to play a central role in establishing the interconnection agreements that are a primary vehicle for implementing and enforcing the incumbent LECs' new duties, the Act also provides another remedy that is at issue here: the provision of § 252(e) that allows federal court review of state commissions' interconnection agreement determinations.

This case presents a very narrow issue involving the scope of this § 252(e) remedy. As petitioners concede (Br. 18), § 252(e)(6) provides for exclusive federal court jurisdiction when a state commission issues a decision that *initially* approves or rejects an interconnection agreement, in whole or in part, and requires the federal court to determine if the agreement meets the requirements of the Act and the FCC's regulations. But petitioners claim that the Act requires a different result when, as here, a state commission has retained jurisdiction to resolve open issues or to interpret or modify

[1] Statutory cites are to Title 47 of the United States Code, unless otherwise indicated.

the agreement and when, as here, a state commission enters an order that further specifies the LECs' obligations under the agreement. In this event, petitioners claims that the state commission is not making "determinations under this section [252]," that the provisions of § 252(e) are inapplicable, and that any challenges to the state commission's order can only be maintained in state courts. Petitioners further claim that the Eleventh Amendment would dictate this result even if the statute were ambiguous.

As explained in detail below, petitioners' claims rest on a wholly artificial distinction that has no support in the statutory text, that is inconsistent with the structure of the Act and the other federal remedies that it creates, and that would severely impede the efficient and orderly administration of this important federal statute.

But to put these claims in their full context requires a more detailed description of (1) the new federal requirements adopted in 1996, (2) the rulemaking, interconnection agreement, and implementation proceedings that have occurred under this Act to date, (3) § 252(e) and the FCC's construction of it, and (4) the specific controversy that gives rise to this case.

1. In the 1996 Act, Congress set out to "end[] the longstanding regime of state-sanctioned monopolies" and "fundamentally restructure[] local telephone markets" so that they, like long distance services, could become effectively competitive. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 377, 378 n.5 (1999). The Act thus establishes a "new federal regime" designed to eliminate the legal and the economic impediments to local competition, *id.* at 379 n.6 (emphasis in original omitted), and "to shift monopoly [telephone] markets to competition as quickly as possible," H.R. Rep. No. 104-204, at 89 (1995).

Section 253 of the Act ends the legal barriers to local competition. It expressly preempts any state law that could

have the "effect" of preventing any firm from offering any telecommunications service. § 253(a).

Sections 251 and 252 of the Act address economic barriers to local entry. Congress recognized that the local networks of the incumbent LECs are characterized by tremendous economies of scale and scope, and that new entrants could not replicate all of the facilities required to provide ubiquitous local calling in any geographic area. Congress thus enacted a number of provisions that require each incumbent LEC to "share its network with competitors" on rates and terms that are just, reasonable, and nondiscriminatory. *AT&T Corp.*, 525 U.S. at 371. Incumbent LECs must, *inter alia*, allow potential competitors to: (i) "interconnect[]" with the incumbents' networks, § 251(c)(2), (ii) purchase "[u]nbundled access" to discrete elements of those networks at cost-based rates, §§ 251(c)(3), 252(d)(2), and (iii) purchase for resale any telecommunications services the incumbents provide to retail subscribers, § 251(c)(4). When competing and incumbent carriers interconnect, each must transport and terminate calls that originate on the others' network, and the originating carrier compensates the terminating carrier through payment of "reciprocal compensation." § 251(b)(5).

Congress legislated these new federal obligations of incumbent LECs. But Congress could not and did not prescribe the myriad technical and economic details necessary for new entrants to establish actual commercial arrangements for sharing the incumbents' facilities on the same terms and economic costs that the incumbents enjoy. Rather, Congress provided that the necessary technical details would be defined through a series of interrelated and overlapping proceedings, and Congress established explicit federal remedies that new entrants can employ at any stage of the process. Congress did so in recognition that incumbent LECs have no incentives to cooperate with potential competitors, but have both the incentive and the ability to seize on pretexts to deny competitors the arrangements that would allow them to

threaten the incumbent monopolies. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, **xxxx** ¶ 134 (1996), *aff'd. in part, vacated in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (hereinafter "*Local Competition Order*").

First, the FCC is authorized to adopt regulations to implement these and other provisions of the Act (§ 201(b)), and the Act required the FCC to adopt regulations to further define the requirements of § 251 within six months of the effective date of the 1996 Act (§ 251(d)(1)). By establishing minimum standards, these regulations would create conditions that could allow incumbent LECs voluntarily to agree to necessary arrangements and would facilitate the establishment of arrangements through arbitration when voluntary "interconnection agreements" are not reached. See *Local Competition Order* ¶ 41. In particular, the FCC's national rules establish a "clear statement of terms that must be included in every arbitrated agreement, absent mutual consent to different terms." *Id.*

Second, to translate the federal duties into still more concrete requirements, the Act authorizes the establishment of so-called "interconnection agreements" between the incumbent LEC and each prospective new entrant in an area. The Act requires the incumbent LEC to "negotiate" the terms of these agreements in "good faith" (§ 251(c)(1)) and where such agreements are reached, the Act assures their speedy approval. In particular, it allows an agreement to be reached "without regard to the requirements [of §§ 251](b) and (c)" and requires that the agreement be approved within 90 days unless the agreement "discriminates against a telecommunication carrier not a party to the agreement" or the "implementation of [the] agreement" is contrary to the public interest. § 252(a)(1), (e)(2)(A).

But when negotiations fail to produce complete agreements after 135 to 160 days, the Act provides that "open issues" are

to be resolved by "arbitration[s]" which the pertinent state commission may elect to conduct and that the FCC conducts if the state commission is unwilling to do so. § 252(b)(1), (c), (e)(1), & (e)(5). The Act provides that arbitrations are to be concluded within nine months of the commencement of negotiations, and provides that the state commission (or the FCC) is to approve or reject the resulting agreement within an additional 30 days. See § 252(b)(4)(A) & (c), (e)(4). Participating state commissions are required to ensure that arbitrated agreements meet the requirements of the Act and the FCC's regulations. See § 252(c)(1) & (e)(2)(B); *AT&T Corp.*, 525 U.S. at 373.

Even after they are "approved," interconnection agreements are wholly unlike common law contracts in numerous respects. Most fundamentally, a new entrant's interconnection agreement does not represent the exclusive source of its rights against the incumbent LEC. If a second new entrant thereafter obtains an interconnection agreement with more favorable rates, terms, and conditions, the first new entrant has a statutory right to avail itself of those more favorable terms and to disregard the terms of its "own" interconnection agreement. See § 252(i); *AT&T Corp.*, 525 U.S. at 395-96. Further, although interconnection agreements have fixed terms (generally three to five years), new entrants are free at any time to request new interconnection agreements that would address issues not covered in the first agreement or that would supercede the first agreement. In addition, the Act allows the incumbent Bell Operating Companies (who serve 80% of the nation)—through "statement[s] of generally available terms and conditions" ("SGATs")—to provide services and facilities without regard to the existence or terms of any interconnection agreement. § 252(f).

Third, "interconnection agreements" (and the foregoing SGATs) are merely documents that define an incumbent LEC's obligations with greater degrees of specificity than does the statute or the FCC's then existing regulations. The

approved section 252 agreements thus typically address scores of individual issues and are lengthy. But because of the complexity of modern telephone networks and of the new intercarrier arrangements that the Act requires, it is impractical and perhaps impossible for even the most carefully negotiated and arbitrated agreement to resolve all of the details of network sharing arrangements and to prescribe precisely what the incumbent must do to effectuate the requirements of the Act and the FCC's regulations. In the course of the implementation of any interconnection agreement (or SGAT), it is inevitable that real or imagined ambiguities in the agreement will be identified, and that questions will arise whether particular proposed interpretations of the agreement do or do not meet the requirements of the Act and the FCC's evolving regulations (and do or do not otherwise comport with the parties' intent).

In recognition of these realities, the Act provides detailed federal remedies to deal with issues that arise after interconnection agreements are approved and during their implementation. In addition to the remedies before the state commission that are directly at issue in this case, section 251 of the Act requires that LECs provide interconnection (under § 251(c)(2)) and access to unbundled network elements (under § 251(c)(3)) in accord both with the terms of the applicable interconnection agreements that have been approved under § 252 and with the substantive requirements of § 251. When LECs are claimed to have violated these (or other) requirements of the Communications Act, injured persons have a federal private right of action against the LEC which can be pursued either at the FCC or in federal district court. See §§ 206-209. Under this federal remedy, the agreements will be interpreted in light of the substantive requirements of the Act, and LEC conduct will be enjoined if it is found to violate the interconnection agreement (as thus construed).

Further, in the case of Bell Operating Companies ("BOC") who seek long distance authority, the Act provides for elaborate state and federal proceedings to determine not just whether the BOC is providing interconnections and access in accord with the provisions of previously approved interconnection agreements, but also whether the BOC has in fact "fully implemented" interconnection agreements or other arrangements under which it is providing interconnections, access to unbundled network elements, and wholesale services for resale in accord with the requirements of §§ 251(c)(2), 251(c)(3), and 251(c)(4). §§ 271(c)(2)(B)(i), (ii), & (iv), (d). The determination of the adequacy of these incumbent LECs' efforts to implement the Act have led state commissions and the FCC to make determinations and records that are thousands of pages long and have generated FCC and state decisions that are hundreds of pages long.[2]

2. Since the 1996 Act was enacted on February 8, 1996, the FCC and the various state commissions have been engaged in virtually continuous proceedings to define the obligations of incumbent LECs to share their complex and evolving network facilities.

The FCC issued its initial regulations on August 8, 1996. But since that date, the FCC has instituted numerous further rulemaking and reconsideration proceedings in which it has modified, clarified, or interpreted these regulations, and many of these proceedings are still pending.[3] In addition, incum-

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[2] *See, e.g.*, *Application of Bell Atlantic N.Y.*, 15 FCC Rcd. 3,953 (1999), *aff'd*, 220 F.3d 607 (D.C. Cir. 2000); *Joint Application by SBC Communications Inc.*, CC No. 00-217, 2001 WL 55637 (F.C.C. Jan. 22, 2001); *Application of Verizon New England Inc.*, 16 FCC Rcd. 8,988 (2001).

[3] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd. 14,171 (1996); *Local Competition Order*, Order on Reconsideration, 11 FCC Rcd. 13,042 (1996); Second Order on Reconsideration, 11 FCC Rcd. 19,738 (1996); Third Order on Reconsideration and Further Notice of

bent LECs have challenged the lawfulness of the FCC's rules in judicial review proceedings, and while most of the FCC's rules have been upheld, some were vacated and remanded to the FCC for further consideration;[4] some were reversed in their entirety by appellate courts;[5] and still others were vacated by an appellate court and later reinstated by this Court.[6] Similarly, state commissions have been continually engaged in their own efforts to define the LECs' obligations under the interconnection agreements that translate the requirements of the Act and the FCC's regulations into more concrete duties, often modifying existing obligations in interconnection agreements. See *infra* at 17-20.

3. The Act provides for federal agency and judicial intervention to ensure that state commission action or inaction under section 252 cannot thwart the Act's implementation. Section 252(e)(4) of the Act provides that no state court can review the actions of a state commission in "approving or rejecting" an interconnection agreement. Section 252(e) also provides that, if a state commission opts not to act in any proceeding or other matter under this section, "then the [FCC will] preempt[] the State's ... jurisdiction" and "assume the responsibility of the State commission" and "act" for the state

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Proposed Rulemaking, 12 FCC Rcd. 12,460 (1997); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3,696 (1999).

[4] *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1, 7-9 (D.C. Cir. 2000); *GTE Serv. Corp.* v. *FCC*, 205 F.3d 416, 427 (D.C. Cir. 2000); *WorldCom, Inc.* v. *FCC*, 246 F.3d 690, 696 (D.C. Cir. 2001).

[5] *Iowa Utils. Bd.* v. *FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (vacating FCC's "superior quality" rules), *cert. granted in part*, 121 S. Ct. 877, 878, 879 (2001) (Nos. 00-511, 00-555, 00-587, 00-590, 00-602).

[6] *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (vacating FCC's combination of network elements rule), *aff'd in part, rev'd in part sub nom. AT&T Corp.*, 525 U.S. at 395 (reinstating rule).

commission "with respect to the proceeding or matter."[7] § 252(e)(5). When the FCC acts to resolve the issues, its orders are reviewable in federal courts of appeals. § 252(e)(6), 402. Similarly, § 252(e)(6) provides that "[i]n any case in which a State commission makes a determination under this section," an "aggrieved" party "may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this [section 252]." §§ 252(e)(6).

The FCC has held that disputes involving the proper interpretation or enforcement of previously approved interconnection agreements are proceedings or matters "within the states' 'responsibility' under section 252." *Starpower Communications*, 15 FCC Rcd. 11,277, 11279-80 ¶ 6 (2000). Thus, where a state commission has refused to act on such "matters," the FCC has entered orders preempting the state and has assumed jurisdiction to interpret and enforce the terms of the previously approved agreement. *Id.* Similarly, where state commissions exercise their responsibility to interpret and enforce these agreements, federal courts have almost uniformly concluded that the state commission has made "a determination" under section 252 and that its decision is reviewable under section 252(e)(6).

4. This case arises from a ruling by the Illinois Commerce Commission ("ICC") requiring Ameritech to pay, in accordance with the Act and its interconnection agreements, "reciprocal compensation" for calls by its customers to Internet Service Providers ("ISPs") that are customers of new

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[7] The state suffers no penalties or adverse consequence when it elects not to exercise responsibilities under § 252. In that event, § 252(e)(6) provides that "judicial review of the [FCC]'s action shall be the exclusive remedy for the state's failure to act." § 252(e)(6). Further, regardless of whether a state accepts or declines Congress' invitation to participate in implementing the new federal scheme, the Act expressly preserves existing state regulation of local telephone service, so long as it does not conflict with federal law. *See* §§ 251(d)(3), 252(e)(3), 261(b).

entrants.[8] See §§ 251(b)(5), 252(d)(2). To fulfill this and other duties under the Act, in 1996 and 1997, the Competing Carrier Respondents and Ameritech had entered into interconnection agreements that incorporated the requirements of the FCC's then-existing reciprocal compensation regulation. *E.g.*, JA 20a, 25a.[9] The agreements expressly provide that they are intended to set forth "the terms and conditions under which the Parties will interconnect their networks and provide other services *as required by the Act*," *e.g.*, *id.* at 19a, 24a (emphasis added).

The parties submitted these agreements to the ICC, and the ICC elected to exercise jurisdiction. After arbitrating other open issues, it approved the agreements. These agreements provide that the ICC retains jurisdiction to resolve disputes about the interpretation and implementation of the agreements and provide for modifications of the agreements in the event of material changes in the FCC's regulations and other provisions of the law.[10] Since the agreement has been approved, the ICC has often exercised this retained jurisdiction.[11]

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[8] The new entrants all are respondents here: AT&T Communications of Illinois ("AT&T"), Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), MCI Telecommunications Corporation and MCImetro Access Transmission Services LLC (collectively, "MCI"), and Focal Communications Corporation ("Focal") (collectively, the "Competing Carrier Respondents ").

[9] The respective parties generally reached mutually agreeable reciprocal compensation terms through negotiation; in TCG's case, the parties settled the provision during the course of an arbitration.

[10] *See, e.g.*, JA 29a-30a; Addenda 3-4.

[11] For example, shortly after certiorari was granted in this case, the ICC approved a negotiated amendment to that agreement "pursuant to Section 252(e) of the Telecommunications Act of 1996." *Illinois Bell Tel. Co. (Ameritech Ill.) and TCG Ill. and TCG Chicago Joint Pet. for Approval of an Interconnection Agreement*, Order § V(3) (ICC Apr. 11, 2001).

In the fall of 1997, the Competing Carrier Respondents filed complaints with the ICC, alleging that Ameritech had stopped paying reciprocal compensation for calls to ISPs in violation of the agreements. See JA 52a, 77a, 90a, & JA 98a. The ICC invoked its jurisdiction under state law and "Section 252 of the Telecommunications Act of 1996 ... to interpret and enforce the terms of interconnections agreements." JA 112a, 121a. Following a full evidentiary hearing, the ICC ruled that by discontinuing reciprocal compensation payments for ISP-bound traffic, Ameritech "violated, and is continuing to violate, its interconnection agreements, and its duty under the Act." JA 114a-116a.

Ameritech sought review of the ICC order in federal district court, invoking jurisdiction pursuant to § 252(e)(6) and 28 U.S.C. § 1331, and asserting that the ICC's reciprocal compensation determination violated federal law. Ameritech named not the ICC, but the individual commissioners in their official capacities, see JA 125a, 130a, seeking prospective injunctive and declaratory relief against ongoing violations of federal law, see *id.* at 145a. The district court denied the commissioners' motion to dismiss the action on both statutory and sovereign immunity grounds, see Pet. App. 27a-30a, and upheld the ICC order on the merits. See JA 173a-180a.

The ICC commissioners appealed the jurisdictional ruling to the United States Court of Appeals for the Seventh Circuit. The court held that the ICC is "charged" in the Act to "determin[e] what the parties intended under the agreement" in accord with the requirements of federal law and to issue decisions "implementing the agreements." Pet App. 13a. It thus agreed that § 252(e)(6) jurisdiction is not limited to the review of interconnection agreements, and that the statute read as a whole shows "Congress envisioned suits reviewing 'actions' by state commissions" that thus implement the 1996 Act. *Id.* at 13a-14a.; *Illinois Bell Tel. Co.* v. *WorldCom Techs., Inc.*, 157 F.3d 500, 501-02 (7th Cir. 1998).

Next, the court rejected the commissioners' assertions of sovereign immunity, based largely on its prior decision in *MCI Telecommunications Corp* v. *Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) ("*MCI I*"), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000) ("*MCI II*"), *cert. denied*, 121 S. Ct. 896 (2001). The court held, as in *MCI II*, that "the participation of the Commission in the scheme set out in the Act is a waiver of the state's sovereign immunity." Pet. App. 13a. The *MCI II* court also had held that suits such as these are "'straightforward' *Ex parte Young* cases." *MCI II*, 222 F.3d at 345. Finally, the court "affirm[ed] the decision of the district court affirming the order of the Illinois Commerce Commission," Pet. App. 22a, holding that "[t]he ICC's conclusion ... does not violate the Act or the FCC's interpretation of the Act," *id.* at 20a.

SUMMARY OF ARGUMENT

The Seventh Circuit correctly held that § 252(e)(6) gives federal courts jurisdiction over state commission orders that interpret previously approved interconnection agreements and that the exercise of this jurisdiction does not violate the Eleventh Amendment. There is no substance to any of the claims raised by petitioners.

1. First, petitioners nave here raised an extreme and untenable statutory claim that rests on artificial distinctions that have no support in the statutory text and that is inconsistent with the structure of the statutory scheme as a whole. In particular, petitioners contend that § 252(e)(6) of the Act provides for federal court review of state determinations of the LECs' obligations to provide interconnections to new entrants only when the determinations are made in connection with the initial "formation" and "approval" of an interconnection agreement. Petitioners claim that federal court review is not available under § 252(e)(6) over "subsequent commission action" in which the state commission enters orders that interpret, modify, or supercede the provisions of the interconnection

agreement after it was initially approved – and makes the *same* determinations under federal law that the commission could have made when it initially approved the agreement.

Petitioners' claims have no support in the text of § 252(e)(6). That provision authorizes actions in an appropriate federal district court "in any case" in which a state commission makes "determinations under this section [252]" and provides that the federal court is to determine whether the resulting interconnection agreement or statement meets the requirements of §§ 251 and 252 and of the FCC's implementing regulations. Under the terms of § 252, it makes no difference to federal court jurisdiction whether the state has made its "determinations" in the "proceeding" in which it initially approved the agreement or in connection with a subsequent proceeding or "matter" in which the state resolved open issues or otherwise interpreted or modified the agreement. In both events, the state commission action will squarely present the question whether the resulting agreement meets the requirements of federal law.

Petitioners' claims are also antithetical to the statutory scheme as a whole. Petitioners' basic contention is that the "goals" of the Act are met by the initial approval of an interconnection agreement that is upheld by a federal court and that Congress intended thereafter to rely exclusively on state court proceedings to assure that the Act is implemented. That is simply wrong. Congress recognized that the initial approval of interconnection agreements that are susceptible of implementation in ways that meet the Act's requirements is only a first step. The Act thus contains a whole panoply of federal remedies to assure that incumbent LECs do not subvert their agreements after they are approved and that the incumbent LECs in fact implement the agreements in a manner that satisfies the terms and purposes of the Act. Petitioners' proposed construction of § 252(e)(6) could create conflicts with the Act's other remedies.

2. Even if this suit had been a suit against the ICC, it waived any Eleventh Amendment claim. It has long been the rule that a state may waive its sovereign immunity by participating in a federal program that clearly conditions state participation on consent to federal jurisdiction. The state commissions had no independent right to implement the new federal regulatory scheme of section 252 without congressional authorization, for Congress could have delegated the administration of that scheme exclusively to the FCC. Instead, it granted state commissions the opportunity to participate, subject to their right to opt out of the scheme and the clear condition that parties aggrieved by determinations that they make under § 252 could seek judicial review in federal court. The ICC (which specifically declared that it was exercising section 252 jurisdiction) accepted the conditions imposed by section 252 in exercising its rights thereunder, and thus consented to federal court jurisdiction under section 252(e)(6).

3. The ICC commissioners are also subject to federal court jurisdiction under *Ex parte Young*. Petitioners contend that *Ex parte Young* jurisdiction cannot be based on a "'claim of error in the exercise'" (Br. 43-44) of statutory jurisdiction under *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). But the passage in *Larson* relied upon by petitioners discussed issues involving ultra vires acts of federal officers and individual-capacity liability that have no applicability to official-capacity suits under *Ex parte Young*. *Ex parte Young* authorizes federal court jurisdiction whenever acts of a state officer in his official capacity violate a federal statute and thus the Supremacy Clause, and the doctrine is always available if the plaintiff seeks prospective relief to vindicate federal statutory rights. Moreover, unlike the statute at issue in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Act does not prescribe a detailed remedial scheme inconsistent with *Ex parte Young* jurisdiction.

ARGUMENT

I. STATE COMMISSION ORDERS THAT INTERPRET, MODIFY, OR ENFORCE INTERCONNECTION AGREEMENTS ARE REVIEWABLE UNDER SECTION 252(e)(6).

Like other courts of appeals, the Seventh Circuit held that state commissions orders that interpret, modify, or enforce previously approved interconnection agreements are subject to judicial review in federal district court under section 252(e)(6). Petitioners contend that this holding is contrary to the plain language of section 252(e)(6) which, they claim, provides for federal court review only of decisions that initially approve agreements. They further contend that the doctrine of constitutional avoidance would compel this Court to reverse even if the matter were doubtful.

Each of the petitioners' arguments lacks merit. "[T]he meaning of statutory language, plain or not, depends on context," *King* v. *St. Vincents Hosp.*, 502 U.S. 215, 221 (1991), and thus courts must "'look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). But petitioners are urging artificial distinctions that have no support in the text of § 252(e)(6) itself. Further, their proposed distinctions are inconsistent with the statutory scheme as a whole, would create conflicts with the Act's other federal remedies, and would serve no rational purpose.

A. Section 252(e)(6) Provides For Federal Court Review Of All State Determinations Of The Lawfulness Of The Requirements That They Prescribe, Irrespective Of When They Are Made.

The interconnection agreements authorized in section 252 are a principal mechanism for implementing the new federal duties that Congress imposed on incumbent LECs to create competition in local telephone markets. See *AT&T Corp.* v.

Iowa Utils. Bd., 525 U.S. 366, 371-73 (1999). In section 252, Congress granted willing state commissions the authority to establish the requirements of interconnection agreements, subject to federal district court review that would assure that the resulting obligations meet the requirements of sections 251 and 252 of the Act and the FCC's implementing regulations.

In the discharge of these obligations to date, state commissions have not attempted definitively to resolve all of the issues that may arise between the parties in advance of the initial approval of the agreements. To the contrary, they have approved agreements that they believed would be susceptible of being implemented in a manner that would satisfy the standards of the Act, and by approving an agreement within the statutory ten month period, they advanced the statutory purpose of allowing the rapid implementation of network sharing arrangements that will allow competition to develop. At the same time, for practical reasons, the state commissions deferred the resolution of certain open issues and more detailed statements of the incumbent LECs' responsibilities to future proceedings that the state commissions retained jurisdiction to conduct. For example, at the time of the initial approvals of agreements, state commissions had almost uniformly made no attempt to establish permanent rates for interconnections and network elements that meet the standards of § 252(d) of the Act. Instead, they have approved agreements that contain "interim rates," but that provide that permanent rates would be set in future arbitration or industry-wide proceedings under the Act's standards and that those rates would supercede those set forth in the previously approved agreement. See, *e.g.*, *US West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999).

Similarly, the agreements did not specify the LECs' obligations with respect to every conceivable type of facility or service arrangement that can be claimed to fall within the duties covered by the agreements. Nor did they generally

prescribe all of the specific performance standards that must be met to satisfy the agreements' and the Act's general requirements. Instead, they provide a mechanism for resolving these questions in the future by providing that when there are specific disputes about the interpretation of the agreements and their application to specific arrangements, those disputes may be brought to the state commissions. *See, e.g.*, JA 28a; Addenda 1-2. In this regard, the parties recognized that fundamental questions involving the obligations of incumbent LECs can be resolved by orders that interpret previously approved agreements. Indeed, orders that nominally interpret agreements can constitute modifications of the agreements.[12]

In addition, the parties have recognized that interconnection agreements (like injunctions and consent decrees) are entered into in response to particular federal statutes and implementing regulations, and that the interconnection agreements must be subject to modification if particular FCC regulations are vacated or revised or if the legal and factual circumstances in existence at the time of their adoption have otherwise fundamentally changed. Compare *System Fed'n No. 91, Ry. Employees Dep't* v. *Wright*, 364 U.S. 642, 646-47 (1961). In establishing the initial agreements, the parties and the state commission have not attempted to adopt provisions that identify all possible future changes in the law and industry conditions and that prescribe how the incumbent LECs' obligations will be altered if any occur. Instead, the agreement provide procedures in which modifications of the agreements can be sought if FCC regulations are invalidated or revised or if other material changes in the law occur. See, *e.g.*, JA 29a-30a; Addenda 3-4.

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[12] *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.9 (1975) (discussing "modification in the guise of constru[ction]"); *Wilder* v. *Bernstein*, 49 F.3d 69, 72 (2d Cir. 1995) (erroneous constructions of decrees constitute modifications); *United States* v. *City of Chicago*, 978 F.2d 325, 333 (7th Cir. 1992) (interpretations are often modifications).

In short, the state orders that have approved interconnection agreements have almost uniformly been subject to the outcome of future proceedings. When state commissions conduct these post-approval proceedings, they must make determinations concerning the lawfulness of the agreement as modified or construed under federal law. In each instance, these are the same legal determinations that the state commission would have made at the time of the initial approval of the agreement if the parties and the state had attempted to foresee all the future issues that would arise and sought to have them resolved in advance.

For example, when final prices are set in post-approval proceedings, the state must determine if the rates meet the standards of §§ 251(c) and 252(d) and the pertinent FCC regulations. §§ 252(d)(2)-(4). When arbitrated agreements are being interpreted or modified, the state will determine if the interpretation of the agreement or the new modified terms satisfy the substantive requirements of §§ 251 and 252 and the FCC regulations. § 252(e)(2)(B).

Matters are no different when a state commission resolves a dispute over the proper interpretation of a term of an interconnection agreement that was not arbitrated but that was "negotiated": that is, agreed to the parties in light of the requirements of the FCC's then-existing regulations. When negotiated agreements are interpreted, the state must determine—at a minimum—if the result is an agreement that satisfies the substantive requirements of federal law that govern negotiated agreements: that is, that the term is non-discriminatory and will be implemented consistently with the public interest. § 252(e)(2)(A). Further, because the FCC regulations establish requirements that are to appear in every interconnection agreement unless there is "clear mutual assent to different terms," *Local Competition Order* ¶ 56, the resolution of disputes about the interpretation of "negotiated" terms will ordinarily turn on a state commission's determinations of how the FCC's then-existing regulations

apply to the particular facility, service, or other condition. That, too, is the same determination that the state commission would have made if the parties had foreseen the dispute before the agreement was finalized and had decided to arbitrate the question of what the incumbent LEC's obligation would be under those particular conditions.

Petitioners concede that when a state commission makes any of the foregoing determinations prior to approval of an interconnection agreement or statement, the determinations are reviewable in federal district court under § 252(e)(6) and that the Act then prohibits state court review. See § 252(e)(4). The federal court and the federal court alone is then to "determine whether the agreement or statement meets the requirements of section 251 and this section [252]." § 252(e)(6).

But petitioners contend that § 252(e)(6) bars federal court review of these same determinations—and requires that they be reviewed only in state court—when the state enters an order modifying, interpreting, or enforcing the agreement after it was initially approved. In petitioners' view, the plain terms of § 252(e)(6) deny federal courts jurisdiction over any such "subsequent commission action[s]." Br. 13. They thus could not review the state orders that apply the standards of § 252(d) and the FCC's pricing regulations to set permanent network element rates that supercede the interim rates contained in the agreement when it was approved. They similarly could not review whether interpretations of broad terms of the agreements violate federal law. Indeed, under petitioners' position, there could be no federal court review even if a federal court had previously upheld the agreement on the ground that it is required by federal law, and the state commission had the next day vacated the agreement based on a purported change in federal law.

While this position is contrary to the Act as a whole, the short answer to petitioners' claim is that the terms of

§ 252(e)(6) do not permit the distinction that petitioners propose, much less require it. That is so for three reasons.

First, § 252(e)(6)'s terms expressly apply to all determinations made under the section, regardless of whether they occur before or after the initial approval of the agreement. In particular, section 252(e)(6) is entitled "Review of State commission actions," and it broadly provides that "[i]n *any* case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement ... meets the requirements of section 251 of this title and this section." § 252(e)(6) (emphasis added). These terms do not permit a claim that a determination of the LECs' responsibilities and their lawfulness is reviewable in federal court when made prior to approval, but not when the same determinations are made thereafter to the agreement as interpreted or modified.

Second, petitioners' claim would be baseless even if these terms applied only to determinations that are made in the "proceedings" in which interconnection agreement are approved. When parties and the state commission defer open issues and questions of the interpretation and modification of the agreements, the future proceedings that result are fundamentally a continuation of the proceedings in which the agreement or statement was approved. They occur because the parties and the commission determined that it was impractical to resolve all possible issues at initial approval, which is statutorily required to occur within ten months of the request for interconnection. Instead, the parties and the commission deferred the issues, and made the approval of the agreement subject to the outcome of the future proceedings.

Petitioners do not argue that the state commissions lack the authority to defer these determinations under § 252 to future proceedings with the assent of the parties to the interconnection agreement. In administering federal statutes, agencies inherently have the authority that is "a 'legitimate,

reasonable, and direct adjunct to ... explicit statutory power.'" *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 655 (1978). Thus, the determinations made in post-approval modification, interpretation, or enforcement proceedings are part of the same "proceeding" in which the agreement was "approved."

For the same reasons, every court of appeals to resolve the issue has held that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission."[13]

Third, § 252(e)(5) establishes that state commissions have responsibilities under § 252 not only in the "proceedings" in which interconnection agreements are formed and initially approved, but also in "other matter[s] under this section." In particular, it provides a mechanism in which a state commission may elect whether or not to discharge its responsibility in "any proceeding *or other matter* under this section [252]" and in which the FCC will assume jurisdiction if the state elects not to act. Whether or not it is a "proceeding" under § 252, it is assuredly a "matter" under the section when a state resolves open issues or interprets, modifies, and enforces an agreement after it had initially been approved.

In this regard, if there were any doubt about the scope of section 252(e), it is resolved by the FCC's authoritative

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[13] *MCI II*, 222 F.3d 323, 338 (7th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("the state commission's power to enforce a federally-mandated interconnection agreement arises from § 252"); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479–80 (5th Cir. 2000) ("the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved").

construction in *Starpower Communications*, 15 FCC Rcd. 11,277 (2000). There, as here, a carrier petitioned a state commission to enter an order construing an interconnection agreement to require the payment of reciprocal compensation for traffic to internet service providers. The state commission declined jurisdiction. See *id.* at 11278 ¶¶ 3-4. The carrier then petitioned the FCC to preempt the state commission's jurisdiction pursuant to § 252(e)(5) and to decide the controversy itself. The FCC granted the petition. It held that that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252." *Id.* at 11,278 ¶ 6. Under the FCC's decision, these disputes are resolved in a "proceeding" or a "matter" within the meaning of § 252(e)(5), and the resulting decision is a "determination under" § 252 that is reviewable in a federal court of appeal when made by the FCC and that is reviewable in federal district court when the state commission elects to do so. § 252(e)(6).

This FCC interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). See *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2172-75 (2001). Section 252 plainly does not expressly prohibit state commissions from interpreting, modifying, or enforcing the interconnection agreements they approve, and the FCC's conclusion that that section grants the authority to the state commissions to conduct these proceedings and to make determinations under § 252 in them is reasonable. See *Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications Corp.*, 225 F.3d at 947 ("we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252").

In urging its contrary position, petitioners make a series of claims. First, they rely, Br. 17-18, on this Court's decision in

Ardestani v. *INS*, 502 U.S. 129, 135 (1991). But it interpreted a statute that authorized awards of attorney fees to prevailing private parties in any federal agency proceedings that had been conducted "under" section 554 of the Administrative Procedure Act. The Court held that, in context, this statutory provision could apply only to agency proceedings that were conducted under statutes or regulations that expressly subjected the agency to the procedural requirements imposed by this provision of the APA. Here, by contrast, Ameritech sought review of the ICC's enforcement determinations "under" section 252, and the ICC had stated, correctly, that its determinations were made "under" section 252. JA 112a, 121a.

Second, the petitioners claims that a district court's exercise of jurisdiction over a state commission's enforcement orders cannot be reconciled with section 252(e)(6)'s authorization of review "'to determine whether the agreement ... meets the requirements of section 251 and [section 252].'" Br. 19 (footnote omitted). According to the petitioners, such a determination "should occur at the time the agreement is approved." *Id.* But that is not so. No less than at the approval stage, the district court exercising enforcement review may determine whether the interconnection agreement, *as interpreted or modified*, meets the Act's requirements. As explained above, when a state commission enters orders that interpret previously approved agreements, that adopt permanent rates that supercede the interim rates in the agreement, or that otherwise modify its provisions, it can raise questions under federal law that had not been previously addressed by the state commission and that could not have been decided by a federal district court in review of the decision approving the agreement.

That is starkly the case with state commission orders that adopt permanent rates under the standards of § 252(d) and the FCC's regulations or that otherwise modify agreements. It is equally true of decisions interpreting arbitrated agreements,

which must comply with the requirements of sections 251 and 252 of the Act. *See* § 252(e)(2)(B). On review of a decision interpreting an agreement, the district court would make the straightforward determination of whether the interpretation of the LECs' duties "meets the requirements of section 251 ... and this section [252]." § 252(e)(6).

The district court conducts a similar analysis for negotiated provisions of an interconnection agreement. If a district court determines that the parties intended the contested provision of the interconnection agreement to implement a duty prescribed under section 251 or 252 of the Act or to incorporate the requirements of particular FCC regulations, it would likewise determine whether the interpretation meets the substantive standards of those sections. If, on the other hand, the district court determines that the parties negotiated a departure from the Act's substantive requirements, it would uphold the agreement as "meet[ing] the requirements" of section 252, which specifically authorizes such departures. See *id.* § 252(a)(1), (e)(6). In either event, the district court would have to determine if the agreement as interpreted satisfied the non-discrimination and public interest standard applicable to negotiated agreements. § 252(e)(2)(A).

Furthermore, as the courts of appeals have held, a district court is not limited under section 252(e)(6) to determining whether the agreement complies with the Act, and may review subsidiary determinations of the state commission under an arbitrary-and-capricious standard. See, *e.g.*, *Brooks Fiber Communications*, 235 F.3d at 498-99; *US WEST Communications*. v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1117, 1124 n.15 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000); *GTE S., Inc.* v. *Morrison*, 199 F.3d 733, 745 (4th Cir. 1999). Those courts have recognized, for example, that the lawfulness of network-element rates in an interconnection agreement cannot be decided unless the district court determines whether the state commission acted arbitrarily in excluding or including certain costs in the ratemaking

proceeding. Cf. § 252(d)(1)(A)(i) (network element rates must be cost-based). Thus, the district court's power and duty to determine the lawfulness of interconnection agreements do not preclude it from interpreting the agreement or reviewing other state commission determinations.

Finally, petitioners claim that the terms of § 252(e)(6) must be construed narrowly because it "grants" federal district courts jurisdiction that would not otherwise exist. But this claim is doubly wrong. Congress enacted § 252(e)(6) against the background of the settled rule that local and state commission orders that authorize conduct that violates federal statutes can be challenged in either federal district court (under 42 U.S.C. § 1983 and 28 U.S.C. § 1331) or in state court. See *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 358-59 (1989). Section 252(e)(6) thus merely creates a separate statutory basis for challenges that could otherwise have been brought in federal court under other provisions of the law. In addition, while this case does not raise the question whether the federal court jurisdiction is exclusive, § 252(e)(4) makes federal court jurisdiction exclusive over at least some and arguably all of these claims that are cognizable under § 252(e)(6).[14]

In all events, even genuine "grants" of jurisdiction are to be construed not narrowly, but in "strict fidelity to their terms." *Stone* v. *INS*, 511 U.S. 386, 405 (1995). That principle requires upholding the Seventh Circuit's decision, for

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[14] Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." § 252(e)(4). If state commission orders resolving issues deferred to future proceedings are deemed to be continuations of approval proceedings (see *supra* 19-25), federal district courts have exclusive jurisdiction over these orders. But even if there is not exclusive federal court jurisdiction under § 252(e)(4), these orders make "determinations" under § 252 and satisfy the different terms of § 252(e)(6), such that they are reviewable in federal court at the aggrieved party's option.

§ 252(e)(6) broadly authorizes judicial review "[i]n *any* case in which a State commission makes a determination under this section," not merely those approving agreements.

B. Petitioners' Construction Is Inconsistent With The Act's Other Remedies And Its Objects.

In addition to violating the terms of § 252(e)(6), petitioners' claims are foreclosed by the Act as a whole and its objects and policies. This point is confirmed by petitioners' attempts to argue otherwise. In particular, petitioners acknowledge that the object of the Act is to foster local competition by implementing arrangements in which incumbent LECs share essential and other related facilities with competitive carriers on terms that are nondiscriminatory and just and reasonable. But petitioners contend that that goal is accomplished by the mere initial formation and approval of interconnection agreements that do not violate federal law on their face. Once that occurs, petitioners contend that there is no longer a substantial federal interest in regulating the LECs' conduct and that it is subject only to state commission orders reviewable in state courts under state contract law.

These claims are flatly contrary to the provisions of the Act as a whole, which dramatically underscore why § 252(e)(6) cannot be construed to apply only to determinations that are made under § 252 at the time of the initial approval of interconnection agreements. First, because Congress recognized that "post-approval conduct" and orders can wholly defeat the Act's objects, the Act contains federal substantive requirements and a panoply of federal remedies that are fully applicable after interconnection agreements have been initially approved. Second, under the Act's terms and settled law, interconnection agreements are matters governed by federal law, not state contract law.

1. Petitioners' Claim Is Inconsistent With The Act's Substantive Provisions And Other Remedies.

The Act's overall terms, structure, history, and stated objects foreclose any claim that Congress could have intended to rely on federal district courts and on federal law merely to assure the initial formation and approval of interconnection agreements that do not violate the Act's requirements on their face and to leave all subsequent regulations of the LECs' responsibilities to state commission actions that are initially reviewable only in state courts.

First, while this case involves a post-approval interpretation of a previously-approved agreement, petitioners' position would bar federal court review of any state commission order entered subsequent to the approval of an interconnection agreement that is found to meet federal law, including decisions that adopt permanent superceding rates or that vacate or modify agreements that had been previously approved. That would allow the absurdity, for example, that a federal court might order changes in an agreement to satisfy federal law but that state commission order would be able, following approval of the required agreement, to vacate it based on a purported change in law, and that decision could not be reviewed by the federal court.

Second, disputes over "interpretations" of provisions themselves present fundamental issues. As courts have repeatedly held, decisions that purport merely to "interpret" consent decrees or contracts can effect fundamental modifications of the provisions. See *supra* n.12. There are myriad situations under the Act when a term of an interconnection agreement is claimed to be susceptible both to an interpretation that would meet the Act's requirements and a second interpretation that would fundamentally violate them. There is the same federal interest in reviewing the post-approval "interpretations" of the provisions as there is

the initial formulation of terms that appear susceptible of implementation that is consistent with the Act.

The overriding fact is that the "approval" of a LEC's interconnection agreement with an individual carrier is merely an intermediate step in the process of translating the requirements of the Act and the FCC's regulations into concrete rights to appropriate commercial arrangements. As the terms of the Act recognize, following the approval of the interconnection agreement, there is a lengthy period of "implementation" in which the competing carrier places orders under that agreement (or an SGAT or a different party's agreement) and in which the LEC will actually provide facilities under rates, terms, and conditions that do or do not satisfy the substantive requirements of §§ 251 and 252. See § 252(c)(3) (implementation schedule), § 271(c)(1)(B) (state determinations of violations of agreement's implementation schedule) & § 271(c)(1)(A), (c)(2)(B)(i)-(iv), & (d)(3)(A) (discussing requirements of "full implementation" of requirements of § 251(c) and § 252(d) that are incorporated into interconnection agreements).

None of the foregoing sections make sense unless § 252 is construed to grant state commissions the authority to ensure that interconnection agreements are implemented in ways that satisfy the duties prescribed under the Act and FCC regulations. The reality is that states cannot practicably discharge that responsibility unless they defer specifications of the LECs' precise duties and can enforce the agreements after they are initially approved. Even if § 252's terms were otherwise ambiguous, a court's interpretation of an agency's power "does not stop with a section-by-section search" for precise terms in the organic statute, and these factors would compel interpreting § 252 to cover these implementation proceedings. *American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 309-10 (1953). Similarly, to preclude federal district court review of the state interpretation of the agreements that occur during implementation proceedings

would plainly subvert the federal interests in having these disputes resolved as efficiently and effectively as possible.

Third, petitioners' claims are refuted by the Act's other remedies. For example, in addition to the other duties it imposes on the incumbent LECs, the Act requires them to provide interconnections and access to unbundled network elements in accord with requirements of both their interconnection agreements and those of §§ 251 and 252. See §§ 251(c)(2) & 252(c)(3). Indeed, the Act specifically provides that all interconnection agreements are "binding" as a matter of federal law. §§ 252(a)(1) & 271(c)(1)(A).

The Act further provides explicit federal remedies for violations of the incumbent LECs' duty to abide by interconnection agreements. Section 206 of the Act creates a private right of action against a common carrier for any act "prohibited or declared to be unlawful" or any omission to do "any act ... required to be done," § 206, and this action can be brought either in federal district court, § 207, or at the FCC, § 208. Because Congress codified §§ 251-261 as an "amendment to, and hence as part of" the Communications Act, Congress expressly provided that these and all the other remedial provisions of the Act are fully applicable to § 251 and the Act's other local competition provisions unless some other provision of the Act creates an express or implied exception to the literal terms of §§ 206-209. *AT&T Corp*, 525 U.S. at 378 n.5 (emphasis in original deleted). See also S. Rep. No. 104-23, at 47 (1995) (discussing availability of Act's remedies for interconnection agreement). The FCC has specifically held that "a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated [interconnection] agreement." *Local Competition Order* ¶ 127. And while one aspect of this decision was challenged on appeal and not resolved by this Court, there is no question that the §§ 206-209 remedies will be available at least to the extent that the lawfulness of a state commission's post-approval

interpretation of an interconnection agreement cannot be litigated in federal district court under § 252(e)(6).[15]

The explicit federal duties of §§ 251(c)(2) & (3) plainly refute petitioners' claim that there is no federal interest in the interpretation or modification of interconnection agreements after they are approved, for interconnection agreements cannot be violated until after they take effect.[16] The existence of the federal rights of action under §§ 206-209 further underscores the conflicts and absurdities that could arise if

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[15] The FCC had more broadly construed its section 208 authority to allow it also to review state-commission decisions arbitrating and approving an interconnection agreement as an alternative to district court review under 47 U.S.C. § 252(e)(6). *Local Competition Order* ¶¶ 127-128. This aspect of the FCC order was challenged as inconsistent with § 252(e)(6). In *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), this Court did not resolve this challenge on the ground that the claim was not ripe for review. 525 U.S. at 386.

[16] Given that Congress has expressly provided federal administrative and judicial remedies, the ICC never explains how state commissions may *without congressional authorization* invoke independent administrative jurisdiction under state law to enforce the federal statute and the obligations created thereby. "It is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union of N. Am.* v. *National Mediation Bd.*, 320 U.S. 297, 301 (1943). Congress must implicitly have authorized a right of administrative enforcement in order for state administrative remedies to be invoked. *See* Henry P. Monaghan, *Federal Statutory Review Under Section 1983 And The APA*, 91 Colum. L. Rev. 233, 251-52 (1991); *see also, e.g.*, *Logan Ranch Karg P'ship* v. *Farm Credit Bank*, 472 N.W.2d 704, 825-26 (Neb. 1991) (no state court jurisdiction unless Congress has authorized a right of action). *Testa* v. *Katt*, 330 U.S. 386 (1947), relied on by petitioners (Br. 22-23), is not to the contrary. It stands for the proposition that state tribunals must be available to enforce rights under federal law, but it only applies if (1) the tribunal's jurisdiction under state law is broad enough to permit it to enforce the federal right, *id.* at 394, and (2) Congress authorized such enforcement, *id.* at 387, 391. The presence of other federal remedies underscores that the Act should be construed to grant state commission enforcement jurisdiction in section 252, rather than to give state commissions jurisdiction by implication under state law.

state commission orders construing or modifying interconnection agreements were reviewable only in state courts. That would create the specter that there could simultaneously be pending both (1) a federal court action against the LEC in which the agreement and the LEC's obligations to competing carriers were construed in light of the requirements of federal law and (2) a state court proceeding reviewing a state commission order that interpreted the same agreement under different standards. The potential for conflicts and needless costs would be minimized or eliminated if § 252(e)(6) were construed to apply to both pre-approval and post-approval determinations of state commissions.

Further, petitioners' claims would create other conflicts with the Act as a whole and its objects. When issues like the application of reciprocal compensation for Internet traffic arise, LECs and competing carriers will not pursue their competing claims only in the context of seeking interpretations of previously-approved agreements. The same issues will be addressed in the arbitration of new agreements (involving more recent entrants) and successor agreements. Petitioners' position would create the absurdity that a state commission's resolution of this single issue would simultaneously be reviewed in state court (in the case of the previously approved agreements) and in federal court (in the case of the newly-approved agreements) and could lead to conflicting results in proceedings involving the obligations of a single LEC in a single state.

Finally, there is no support for petitioners' sole attempt to identify other provisions of the Act that support their claims that state commission determinations of the requirements of federal interconnection agreements are reviewable in state court only when they follow the initial approval of the agreement (but not when they precede it). Petitioners rely, Br. 22, only on the provisions of § 2(b). See § 152(b). It protects state utility commission jurisdiction over intrastate services by providing that nothing in the Act shall be

"construed" to "apply" or to "give the [FCC] jurisdiction" over intrastate services. But this Court has already held that these provisions have no relevance to the duties imposed by §§ 251 and 252 in that they unambiguously apply to "local competition" and remove "a significant area from the States' exclusive control" under state law. *Iowa Utils. Bd.*, 525 U.S. at 382 n.8. Moreover, § 2(b) merely adopts a rule against construing provisions of the Act to give the FCC jurisdiction; it has no applicability to the question whether state commission determinations under § 252 are to be reviewed in federal court (under § 252(e)(6)) or only in state court. But even if § 2(b)'s rule of construction were here applicable, the statutory terms unambiguously establish that federal courts have jurisdiction over all state determinations under § 252, not merely those that precede initial approval of an agreement.

2. Interconnection Agreements Are Compulsory Federal Contracts That Derive Their Legal Force From Sections 251 and 252 Of The Act.

Petitioners are also wrong in arguing that the instant case – and other cases that will arise – are nothing more than a "state contracts case." Br. 25. There is no basis for conceiving of interconnection agreements as ordinary, voluntary contracts under state law. The latter derive their force from the will of the parties, and are (in general) no more than promises to pay damages upon breach. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 919-20 (1996) (Scalia, J., concurring in the judgment). Interconnection agreements, by contrast, are mandated by a federal statute to implement federally prescribed duties and may be imposed upon the incumbent against its will. *Local Competition Order* ¶ 134 ("the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation"); see *supra* at 4-6. Federal law dictates the subject matter that will be embodied in the agreement, requiring implementation of the

federal duties that the Act imposes upon the incumbent in sections 251(b) and (c) to open local markets to competition. See § 251(c)(1).

It is simply beside the point that the incumbent and the requesting carrier may adopt "negotiated" agreements that will be approved without regard to the standards imposed upon incumbents in sections 251(b) and (c). § 252(a)(1). Even then it is by force of the Act that the negotiated interconnection agreement is "binding," once approved as the Act prescribes. *Id.* More fundamentally, the Act provides for regulatory intervention to impose agreement terms that satisfy federal law requirements on those parties that cannot reach consensus, and it is the threat of arbitrated outcomes that gives incumbents whatever incentive they have to agree to contract terms. *Id.* § 252(e).

In short, "the rights and duties contained in those contracts [are] federal in nature," *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 23 (1982). Interconnection agreements are creations of federal law for the same reason federal labor contracts are. Each is:

> bound to the statute and its policy. If any provision contained in a § [252] contract is enforceable, it is because of congressional sanction: The federal statute is the source of the power and authority. The enactment of the federal statute is the governmental action though it takes a private agreement to invoke the federal sanction. [Such an] agreement ... has, therefore, the imprimatur of the federal law upon it ... [and] is a federal contract ... governed and enforceable by federal law, in the federal courts.

International Ass'n of Machinists v. *Central Airlines, Inc.*, 392 U.S. 682, 692 (1963) (original omissions, alterations, quotation marks, and citation omitted).

Each interconnection agreement operates as a "contract tariff."[17] Like contract and other tariffs, incumbent LECs are not only bound to comply with the terms of the agreement with respect to the other party to that agreement, but must provide "any interconnection, service, or network element" on those same terms to any other requesting carrier. § 252(i); *AT&T Corp.*, 525 U.S. at 395-96. Like tariffs, interconnection agreements are "responsibilities imposed by the federal law, to the exclusion of all other ... obligation[s]" and implement duties that carriers have to serve classes of customers on terms that are non-discriminatory, just, and reasonable. *Louisville & Nashville R.R.* v. *Rice*, 247 U.S. 201, 203 (1918) (internal quotation marks omitted); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983) (per curiam) (Communications Act "tariffs are not simply contracts; they have the force of federal law"); *Fax Telecommunicaciones Inc.* v. *AT&T*, 138 F.3d 479, 488 (2d Cir. 1998); *accord Lowden* v. *Simonds-Shield-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) ("tariffs bind both carriers and shippers with the force of law").

C. The Doctrine Of Constitutional Avoidance Is Inapplicable.

Finally, even if petitioners' proposed interpretation were a possible and permissible one – as it is not – there is no basis for petitioners' claim that § 252(e)(6) should be construed narrowly to "avoid" issues under the Eleventh Amendment. Br. 27-28. Petitioners concede that § 252(e)(6) gives federal courts jurisdiction to review determinations made when agreements are initially approved, and making state commissions parties to these suits will present the same Eleventh Amendment issues that petitioners purport to seek to avoid, regardless of whether § 252(e)(6) is held to apply to determinations under § 252 that state commissions have

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[17] *See Competition In Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880 (1991) (authorizing contract tariffs).

deferred to future proceedings and made following the initial approval of the agreements. In deciding whether § 252(e)(6) requires the arbitrary distinction that petitioners urge, the only question should be whether that is required by the statute's text and is consistent with the Act as a whole and its structure, objects, and policies. For the reasons stated, it is not.

D. Section 252(e)(6) Grants District Courts The Jurisdiction To Resolve The Construction Of Interconnection Agreements.

Although the court of appeals correctly held that the district courts had jurisdiction to review the ICC's order under section 252(e)(6), it has also adopted what has aptly been termed an "absurd jurisdictional scheme." *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 498 n.2 (10th Cir. 2000). Under it, "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.'" Pet. App. 5a. This aspect of the Seventh Circuit's decision is erroneous.

The Seventh Circuit fashioned its bifurcated jurisdictional scheme because it believed that state law governs the interpretation of the agreements and the only federal question is whether the interpretation violates federal standards. That is wrong for two independent reasons. First, both "negotiated" and arbitrated agreements present federal questions under the act. See *supra* at 19-20, 25. Second, interconnection agreements are federal contracts. See *supra* at 33-35.

Further, even if state law did govern those agreements, and even if somehow there were no supplemental jurisdiction under 28 U.S.C. § 1367, that would be no impediment to a district court's review of the commission's interpretation of the agreement. First, the district court must interpret the interconnection agreement in order to perform its duty of

determining whether the agreement violates the Act. Thus, any alleged state-law question regarding the existence and meaning of the agreement "is a federal question," and the district court cannot "'surrender the duty to exercise [its] own judgment,'" although it may give weight to the state tribunal's views. *General Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992). Second, even if agreement interpretation were not itself a federal question, federal courts always have power to resolve state-law questions that are the predicates for determining questions of federal law. See, *e.g.*, *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 12-14 (1979).

II. THE ICC HAS WAIVED ITS SOVEREIGN IMMUNITY.

Petitioners contend that, if section 252(e)(6) is construed to grant the federal district courts jurisdiction to review state commission orders enforcing interconnection agreements, such review would violate sovereign immunity, which they claim that the ICC did not waive. Their argument is baseless.

It has long been the rule that "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, *or by otherwise waiving its immunity to suit in the context of a particular federal program*." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 n.1 (1985) (emphasis added). The petitioners seeks to evade this rule by claiming that this Court severely curtailed the power of Congress to elicit waivers of sovereign immunity by states that participate in federal programs in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); Br. 32-40, even though no federal program was at issue in that case. The petitioners misread *College Savings Bank*, which directly affirmed the power of Congress to elicit sovereign immunity waivers in the manner it did in the 1996 Act. As this Court has declared, "[t]here is no doubt ... that if the federal courts believe a state commission is not regulating in accordance with federal

policy [under the 1996 Act] they may bring it to heel." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999).

In *College Savings Bank*, this Court reaffirmed the longstanding rule that a state may waive its sovereign immunity, but emphasized that the waiver must be "altogether voluntary on the part of the sovereignty." 527 U.S. at 675 (internal quotation marks omitted). The issue in *College Savings Bank* was whether a state's participation in an activity *regulated by* federal law (in that case, the marketing in interstate commerce of prepaid college tuition plans) constituted voluntary waiver simply because Congress had authorized a private right of action in federal court against the state for violations of the Lanham and Trademark Remedy Clarification Acts. *Id.* at 671.

This Court held that the state did not waive its immunity merely by engaging in such federally regulated activity. *Id.* at 676-77. In so holding, the Court overruled *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), which had held that a state waives its immunity by operating a railroad subject to suit in federal court under the Federal Employers' Liability Act. 377 U.S. *id.* at 192-93. *Parden*-style waiver was impermissible, the Court held, because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *College Savings Bank*, 527 U.S. at 680. Congress cannot make consent a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such an activity is a "sanction" that coerces a state into consenting to suit. *Id.* at 687. Thus, in *College Savings Bank*, the Florida agency did not waive its immunity simply by engaging in commercial activity regulated by federal statute.

In rejecting "*Parden*-style waiver" – a term appearing three times in the majority opinion, see *id.* at 679, 681, 683, to describe waiver based on state engagement in federally regulated conduct – this Court took pains to distinguish the

"fundamentally different" implied waivers of state sovereign immunity that were effective because Congress had offered a "gratuity" to the States conditioned on a waiver of immunity. *Id.* at 686; *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d 636, 644 (5th Cir. 2001) (noting that *College Savings* "expressly overruled *Parden* and its 'constructive-waiver experiment [as] ill conceived,'" but did not forbid other forms of implied waiver) (quoting 527 U.S. at 680).

First, the Court reaffirmed the validity of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), which "held that a bistate commission which had been created pursuant to an interstate compact ... had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Savings Bank*, 527 U.S. at 686. The implied waiver of sovereign immunity in *Petty* was valid because the states had no independent right to "form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.*

Second, the Court noted that implied waiver of state constitutional immunities was firmly established by *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which held that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Savings Bank*, 527 U.S. at 686. Accordingly, the Court reaffirmed the rule of *Atascadero*, another Spending Clause case, that participation in a federal program constitutes consent to federal court jurisdiction if the statute "manifest[s] a clear intent to condition participation in the programs ... on a State's consent to waive its constitutional immunity," 473 U.S. at 247. See *College Savings Bank*, 527 U.S. at 678 n.2.

Thus, as the Fifth Circuit has held, agreeing with the Seventh and Tenth Circuits, the Court's discussion of those

cases in *College Savings Bank* affirmed the rule that "Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity, if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on waiver of immunity." *AT&T Communications*, 238 F.3d at 645; *MCI II*, 222 F.3d 323, 340 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001); *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 937 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001). The Fifth Circuit has properly characterized *College Savings Bank* as establishing a three-part test for determining when a state's conduct will by implication constitute a voluntary waiver of sovereign immunity if the (1) the statute gives the state unambiguous notice that participation is conditioned on waiver; (2) nonparticipation would not exclude the state from activities otherwise lawfully within its powers; and (3) the state elects to engage in the conduct or transaction after such legal notice has been given. *AT&T Communications*, 238 F.3d at 644. Those three conditions have been amply met by the 1996 Act.

1. State participation in a federal program will constitute voluntary waiver so long as the federal statute "manifest[s] a clear intent to condition participation in the programs ... on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 238, 247. The 1996 Act clearly put state commissions on notice that their participation in the federal scheme was conditioned on submission to federal judicial review. Congress offered the state commissions broad regulatory authority over interconnection agreements in section 252, and then directly provided that its orders were reviewable "[i]n any case in which a State commission makes a determination" under section 252. § 252(e)(6). Because the petitioners had declared that they were exercising authority under 252 in issuing the enforcement order, and thus were "mak[ing] a determination under this section" within the

meaning of section 252(e)(6), they cannot reasonably claim that they lacked knowledge that they would be subject to suit under that statute for review of their enforcement decision. Thus, contrary to the petitioners' claim (Br. 30-31), the notice that voluntary participation in the section 252 federal scheme waives state sovereign immunity is in the statutory text, not simply implied by the statutory structure. The "'overwhelming implications from the text ... leave no room for any other reasonable construction.'" *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974).

> "Congress has expressed unmistakably that, under [the Act], states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewed in federal court" and that the "Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court."

AT&T Communications, 238 F.3d at 646-47 (quoting *MCI II*, 222 F.3d at 341); see also *MCI Telecomms.*, 216 F.3d at 938.

The petitioners protests that section 252(e)(6) does not expressly provide that state commissions must be named as defendants. Br. 30-31. Although the state commission is not an indispensable party in review of orders enforcing interconnection agreements, see *Williams* v. *Fanning*, 332 U.S. 490, 494 (1947) (Postmaster General not an indispensable party in proceeding for review of his order if effective relief could otherwise be granted), the universal practice is that administrative agencies are always proper parties in actions for judicial review of their orders. See 5 U.S.C. § 703; *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 265 (1997); 14 Am. Jur. 2d *Certiorari* § 56 (2001) (under the writ of certiorari (the original writ for review of agency action) the agency is joined as a party in its own name). Indeed, the petitioners concede "that if § 252(e)(6) permits federal court

suits seeking review of interpretation and enforcement decisions, the petitioners should be a party to those suits." Br. 29 n.12.

Finally, the petitioners contend that Congress intended to abrogate state immunity, not elicit a waiver, because the 1996 Act was passed before this Court ruled in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Congress lacked power under the Commerce Clause to abrogate state sovereign immunity. Br. 32. Even if there were any validity to this point, it would be irrelevant, for so long as the statute may be construed to elicit waiver, that construction should be adopted. *Hooper* v. *California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). But the petitioners' point has no validity. All duties and obligations that the Act imposes upon state commissions are consensually undertaken, for the Tenth Amendment prohibits Congress from commandeering state agencies to implement federal law. This principle was established by this Court's decision in *New York* v. *United States*, 505 U.S. 144, 166 (1992), and Congress clearly structured the 1996 Act to comport with that precedent. Thus, the only reasonable reading of the 1996 Act is that state participation in the section 252 scheme is voluntary and that consent to federal jurisdiction under section 252(e)(6) is a condition of that voluntary participation.

2. State participation in the regulatory scheme of the 1996 Act is a gratuity because it requires Congress's authorization, which Congress was free to withhold. The Commerce and Supremacy Clauses allow Congress to preempt state regulation of telecommunications entirely. *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982); *MCI Telecomms.*, 216 F.3d at 938. Congress chose to preserve certain areas of state authority in the spirit of "cooperative federalism," *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); see, *e.g.*, §§ 251(d)(3), 252(e)(3), 253(b), 261(c), but

it "unquestionably" took away from the states the independent power to regulate "the matters addressed by the 1996 Act." *AT&T Corp.*, 525 U.S. at 379 n.6. Congress thus federalized the regulation of local competition under the Act, and did not, as the petitioners contends, merely attempt "to influence, to varying degrees, the States' own exercise of their pre-existing authority." Br. 35. Indeed, the federal gratuity of section 252 power broadened the state commission's power in certain respects, giving them an interstate as well as intrastate jurisdiction. *Local Competition Order* ¶ 84; JA 58a & n.14.

Because Congress could have reserved the administration of the new federal regulatory scheme to the FCC alone, the power to implement section 252 of the Act is a gratuity to the states to which Congress may attach the condition of waiver of sovereign immunity. As in *Petty* and *Dole*, Congress was under no obligation to offer states something they could not obtain on their own, *viz.*, participation in the 1996 Act's federal regulation of local telecommunications competition. Also, as in those cases, the state was free to accept or reject such participation as a gratuity without abstaining from any lawful activity within its power. *AT&T Communications*, 238 F.3d at 646; *accord MCI Telecomms.*, 216 F.3d at 938; *MCI II*, 222 F.3d at 343-44.

3. Acceptance of this legislative bargain was and is voluntary. If the state commission opts not to perform any responsibility under section 252, including enforcement of interconnection agreements, the FCC "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." § 252(e)(5).

The petitioners claims that the statutory scheme is coercive because "federal regulatory power created this precondition for waiver," Br. 38, and that withholding consent would require it to abandon the regulation of telephone carriers that it has conducted for 90 years. *Id.* at 39. That claim is overstated; the petitioners would forego only the regulation of

Section 252 interconnection agreements between competing carriers (arrangements that were created by the federal Act), not its traditional regulation of carriers' provision of telephone service to the public. But in any event, this Court directly rejected such arguments in *FERC* v. *Mississippi*, where Congress put the states to the choice of considering federal standards or suffering preemption of their traditional power to regulate utilities. 456 U.S. at 765. This Court acknowledged that utility regulation was "an area of overriding concern" to the States, and that "the choice put to the States – that of either abandoning regulation of the field altogether or considering the federal standards – may be a difficult one." *Id.* at 766. But Congress may use its power "to induce state action" in ways it could not mandate directly, and there was no unconstitutional coercion in legislation "affecting their freedom to make decisions in areas of integral governmental functions." *Id.* (internal quotation marks omitted); *Alden* v. *Maine*, 257 U.S. 706, 755 (1999) ("the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits"). Because the ICC could have opted out of the section 252 program (as the Virginia Corporation Commission did), it was not subject to federal coercion. See *New York*, 505 U.S. at 167-68.

Finally, there is no merit to the petitioners' claim that its consent was not voluntary because state law obliges it to participate in the federal program. Br. 37. The ICC cannot claim at once to be the state for purposes of the Eleventh Amendment and to be subject to the external compulsion of state law. In any event, state law in this context is irrelevant; in federal programs, whether statutory conditions are met, and sovereign immunity waived, is a question of federal law. *Petty*, 359 U.S. at 278-79; *Atascadero*, 473 U.S. at 238 n.1. The ICC does not claim that it lacked legislative authorization to participate in the § 252 program; the state legislature specifically declared that "it is in the immediate interest of the People of the State of Illinois to exercise its rights within the

new framework of federal telecommunications policy." 220 Ill. Comp. Stat. 5/13-102. The ICC cannot exercise rights under the 1996 Act and yet refuse to accept the duties the Act imposes. By freely accepting the role that Congress offered state commissions under the 1996 Act, the ICC "assume[d] the conditions that Congress under the Constitution attached." *Petty*, 359 U.S. at 281-82. The ICC waived its sovereign immunity.

III. THE ICC COMMISSIONERS ARE SUBJECT TO FEDERAL JURISDICTION UNDER *EX PARTE YOUNG*.

Regardless of whether the ICC itself is subject to suit, the district court had jurisdiction under *Ex parte Young*, 209 U.S. 123, 156-60 (1908), to enforce the 1996 Act by ordering injunctive and declaratory relief against the ICC's *individual* members in their official capacities. See *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d 636, 647 (5th Cir. 2001); *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867-68 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000). *Ex parte Young* allows such suits when (1) "a plaintiff alleges an ongoing violation of federal law," and (2) "the relief sought is prospective rather than retrospective." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 294 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring) (emphasis in original omitted); *accord id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). *Ex parte Young* jurisdiction is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984). Indeed, this Court recently reaffirmed that *Ex parte Young* remains an "essential ... part of our sovereign immunity doctrine," and "suits for declaratory or injunctive relief against state officers must ... be permitted if [federal law] is to remain the supreme law of the land." *Alden*, 527 U.S. at 747, 748.

The petitioners claim that *Ex parte Young* does not extend to state officers who "in the course of resolving disputes within [their] jurisdiction" render decisions that are alleged to conflict with federal law, and relies on a purported "general rule" from *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), that "a claim of error" in the officer's exercise of authority will not deprive him of immunity. See Br. 42-45.

The petitioners misread *Larson*.[18] In that case, the plaintiff sued a federal officer for an injunction preventing the officer from selling to others coal that the plaintiff had allegedly bought from the government. This Court identified "two types" of cases in which suit can be brought to restrain the conduct of a government official. 337 U.S. at 690. The first is where, by his own actions, the officer acts as an individual. If he "is not doing the business which the sovereign has empowered him to do or he is doing it in a way the sovereign has forbidden," his acts are *ultra vires*, *id.* at 690, and he may be sued in his *individual capacity*. But to bring suit on this basis, the plaintiff must show "a lack of delegated power," and not merely "a claim of error in the exercise of that power." *Id.* at 689. The *ultra vires* rationale for restraining the conduct of government officers has nothing to do with *Ex parte Young*. The parallel claim is that a state officer is acting

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[18] To the extent the ICC may be understood to claim that state officers acting in a quasijudicial capacity are not subject to the equitable powers of federal district court, that is not the law. *See, e.g., Juidice* v. *Vail*, 430 U.S. 327 (1977) (suit against state court judge to enjoin state court proceedings under an exception to the Anti-Injunction Act); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (suit challenging state officer's administrative adjudication of welfare benefits); *Ex parte Virginia*, 100 U.S. 339, 349 (1879). Moreover, the ICC also exercises a quasilegislative authority under section 252, given its ratemaking authority and the regulatory discretion it exercises to impose terms and conditions in interconnection agreements. *See* 47 U.S.C. § 252(b), (d). *Cf. Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 388-90 (1894) (*Ex parte Young* jurisdiction over commissioners to review rate determinations).

ultra vires his state law authority. No such claim is made here, and indeed this Court held that such a claim cannot be the basis of *Ex parte Young* jurisdiction. *Pennhurst*, 465 U.S. at 113.

The second and distinct category is where the officer is claimed to be "acting unconstitutionally or pursuant to an unconstitutional grant of power." *Larson*, 337 U.S. at 691; *Dalton* v. *Specter*, 511 U.S. 462, 472 (1994) ("unconstitutional and ultra vires conduct" are "separate categories"). In such a situation, the individual officer acts in his official capacity, but he cannot claim the power of the sovereign because the sovereign cannot confer authority to act contrary to the Constitution. All *Ex parte Young* claims are of this kind, and hence are official-capacity suits. *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985). Because conduct contrary to federal statute violates the Supremacy Clause, *Maryland* v. *Louisiana*, 451 U.S. 725, 760 (1981); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 125 (1965); *Federal Land Bank* v. *Board of County Commissioners*, 368 U.S. 146, 156 (1961), and negates any claim of state sovereign authority, *Ex parte Young* jurisdiction may be invoked against state officers to vindicate federal statutory rights. *Quern* v. *Jordan*, 440 U.S. 332, 346-48 (1979); *Swift*, 382 U.S. at 114, 129 (holding, in rejecting statutory jurisdiction of a three-judge district court, that the single-judge district court had jurisdiction over the suit against a state officer for violation of federal statute). Under this basis of *Larson*, *Ex parte Young* may be invoked to correct the wrongful acts of state officials, not simply acts taken under invalid statutory authority. *Greene* v. *Louisville & Interurban R.R.*, 244 U.S. 499, 507 (1917). "[W]here state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief." *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932).

Moreover, the petitioners misconceive the claims of carriers seeking judicial review under section 252(e)(6). They do not sue simply to correct interpretive error, but to prevent the enforcement of allegedly unlawful interconnection agreement terms imposed upon them by the state commissioners in violation of the Act. Cf. *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 230 (1908) ("when the rate is fixed, a bill against the commission to restrain the members from enforcing it will not be bad ... as a suit against a State, and will be the proper form of remedy"); *Shields* v. *Utah Idaho Cent. R.R.*, 305 U.S. 177, 183-84 (1938). Because the allegedly unlawful interconnection agreement terms have prospective force, *Ex parte Young* jurisdiction is proper to cure the ongoing effects of the commissioners' violation of federal law. *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977); *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986).

The petitioners also make the odd claim that by authorizing "judicial review" under section 252(e)(6), Congress thereby precluded injunctive or declaratory relief. Br. 45. First, *Ex parte Young* jurisdiction is the traditional form of judicial review of state commission actions in federal courts, and it can hardly be said that Congress intended to prohibit it in a statutory provision entitled "Review of State commission action."[19] Second, the fact that under statutory review a district court need not invoke the nonstatutory writs, and may simply "remand" to the agency, is of no moment. Remands are no less coercive in the relevant sense, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) (the agency is "bound to act upon the correction" of law by the agency), but regardless injunctions are always available even in federal statutory review of agency orders. See, *e.g.*, *National Mining*

[19] *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951) (rejecting challenge by state public service commissioners to federal judicial review of commission orders "in view of the many cases prior to and following *Ex parte Young*, in which this Court has granted such relief over the same objection") (citation omitted).

Ass'n v. *United States Army Corps of Eng'rs*, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998); 28 U.S.C. § 1651.

Equally unfounded is the petitioners' claim that the single sentence in § 252(e)(6) authorizing judicial review is "'a detailed remedial scheme,'" Br. 45, preclusive of *Ex parte Young* jurisdiction, much like the statutory scheme at issue in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 75-76 (1996). There is no comparability. The statute at issue in *Seminole Tribe*, the Indian Gaming Regulatory Act ("IGRA"), obligated states to negotiate a regulatory compact with Indian tribes wishing to develop gaming enterprises on tribal lands within the state, 25 U.S.C. § 2710(d)(3), and provided a judicial right of action for a tribe to compel the state to negotiate in good faith, *id.* § 2710(d)(7)(A)(i) & (B)(i). See 517 U.S. at 49. Once the jurisdiction of the district court is invoked, other provisions of IGRA "describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact." *Id.* at 50. Because certain of the remedies authorized against the State—such as statutory mediation for violations of court orders to negotiate a compact—were inconsistent with normal con-tempt sanctions that would be available in a suit against the officers, the Court concluded that Congress intended to prohibit the Tribe from invoking *Ex parte Young* to enforce the statute. See *id.* at 75-76. The Court cautioned, however, that its holding was limited to the statute before it, and that it did not hold that every limited remedial scheme in a statute foreclosed *Ex parte Young* actions. *Id.* at 75 n.17.

By contrast, section 252(e)(6) does no more than provide a right of review in federal court. It does not speak to the issue of what relief a district court may order if it finds a violation, much less create an "intricate remedial scheme," *id.* at 74, of special post-judgment statutory relief that might conflict with traditional equitable relief. Judicial review is always an exercise of equitable jurisdiction, and, absent any express statutory limitation on the relief a court may order, the full panoply of equitable remedies available in any judicial review

proceeding must be presumed available here. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992). Congress did not bar the district court from exercising *Ex parte Young* jurisdiction.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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ADDENDUM

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of January 14, 1997

by and between

AMERITECH INFORMATION INDUSTRY SERVICES,

a division of Ameritech Services, Inc. on behalf of and as agent for Ameritech Illinois

and

AT&T COMMUNICATIONS OF ILLINOIS, INC.

* * * * * * * * * * *

21.2 Renegotiation of Prices and Terms.

21.2.1 Renegotiation of Prices. Notwithstanding anything to the contrary contained herein, either Party may require negotiations of one or more of the rates, prices, and charges of the services to be provided under this Agreement to be effective on the date three (3) years after the Effective Date (the **"Price Renegotiation Date"**). Such negotiations shall be requested by delivery of written notice at least one-hundred twenty (120) days prior to the Price Renegotiation Date. In addition, if negotiations are required by a Party, the other Party may include as part of the negotiations any other rates, prices and charges of this Agreement which relate to those the other Party has requested be negotiated. If the Parties are unable to satisfactorily negotiate such rates, prices and charges within ninety (90) days of such written notice, the procedures set forth in ***Section 21.2.3*** shall be followed.

21.2.2 Renegotiation of Terms. Notwithstanding anything to the contrary contained herein, either Party may

require negotiations of one or more of the rates, prices, charges, terms and conditions of the services to be provided under this Agreement effective upon expiration of the Initial Term or any Renewal Term. Such negotiations shall be requested by delivery of written notice at least one hundred twenty (120) days prior to the expiration of such Initial Term or Renewal Term. In addition, if negotiations are required by a Party, the other Party may include as part of the negotiations any other rates, prices, charges, terms, and conditions of this Agreement which relate to those the other Party has requested be negotiated. If the Parties are unable to satisfactorily negotiate such new rates, prices, charges, terms or conditions within ninety (90) days of such written notice, the procedures set forth in ***Section 21.2.3*** shall be followed.

21.2.3 Resolution of Unsatisfactorily Negotiations. If the Parties are unable to satisfactorily negotiate rates, prices, charges, terms and conditions pursuant to ***Section 21.2.1*** or ***21.2.2***, either Party may petition the Commission or take such other action as may be necessary to establish appropriate terms. If prior to the (i) Price Renegotiation Date, if pursuant to ***Section 21.2.1*** or (ii) applicable expiration date, if pursuant to ***Section 21.2.2***, the Parties are unable to mutually agree on such new prices or terms or the Commission does not issue its order, the Parties agree that the rates, prices, charges and/or terms ultimately ordered by such Commission or negotiated by the Parties shall be effective retroactive to such Price Renegotiation Date or expiration date, as the case may be.

* * * * * * * * * * *

29.3 Amendment or Other Changes to the Act; Reservation of Rights. The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date. In the event of any amendment of the Act, or any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises or reverses the Act, the FCC's First Report and Order in CC Docket Nos. 96-98 and 95-185 or any applicable Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, an **"Amendment to the Act"**), either Party may be providing written notice to the other Party require that the affected provisions be renegotiated in good faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement. If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, each Party reserves its right and remedies with respect to the collection of such rates or charges on a retroactive basis; including the right to seek a surcharge before the applicable regulatory authority.

29.4 Regulatory Changes. If any final and nonappealable legislative, regulatory, judicial or other legal action (other than an Amendment to the Act, which is provided for in ***Section 29.3***) materially affects the ability of a Party to perform any material obligation under this Agreement, a Party may, on thirty (30) days' written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and has otherwise become final and nonappealable), require that the affected provision(s) be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new provision(s) as

may be required; *provided* that such affected provisions shall not affect the validity of the remainder of this Agreement.

29.5 Proxy Rates. In the event the initial rates under this Agreement are "proxy rates" established by the FCC or the Commission, the Parties are to substitute rates later established by the FCC or Commission under procedures consistent with the Act and any Order of the FCC or Commission.

Supreme Court, U.S.
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No. 00-878

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTRODUCTION

Respondents barely acknowledge the text of the relevant statutes before hurrying to argue that federal suits to review interpretations of interconnection agreements are essential under the Telecommunications Act of 1996 ("the 1996 Act" or "the Act"). Respondents' claims run afoul of various requirements that the plain language of statutes be honored when those statutes grant federal jurisdiction or are relied on to breach Eleventh Amendment immunity. And although Respondents acknowledge that the 1996 Act changed the regulation of local telecommunications profoundly, they do not appreciate the nature of the change. Rather than recognize that the Act represents a new regulatory model that promotes competition by treating telecommunications providers more like traditional business competitors, Respondents, both as the regulator (the United States) and the regulated (Ameritech, AT&T and WorldCom), seek to stave off the Act's consequences in favor of the familiar comfort of universally-applicable rules. Their effort is built on a series of untenable propositions, among them that a contract is not really a contract, that interpreting the language of a contract is really modifying or re-forming it, that only federal courts can assure consistency with federal law, that "shall" means "may," and that "fails to carry out its responsibility" means "freely declines." Bereft of these propositions, Respondents' positions cannot stand.

I. RESPONDENTS' READING OF §252 IS INCONSISTENT WITH ITS PLAIN LANGUAGE AND WITH THE COMPETITIVE OBJECTIVES OF THE 1996 ACT.

In arguing that state commissions make interpretation and enforcement decisions "under [§252]," Respondents make no

serious effort to address the language of that section.[1] Instead, they offer textually-unsupported claims regarding, for example, what Congress "necessarily" intended, Brief of the United States ("US Br.") at 12, or "could not have intended," *id.* at 18. Respondents rely on words or phrases in § 252(e)(6) such as "any case," "determination" or "action," but do not recognize that *each* of those words or phrases is qualified by the phrase "under this section." Whatever action a state commission may take, it must be done "under" § 252 to be reviewed in federal court under § 252(e)(6).

Ameritech argues that § 252(a)(1) refers to interconnection agreements as "binding" and then leaps to the claim that the duty to adhere to these agreements is thereby imposed "under" § 252. Brief of Ameritech ("Ameritech Br.") at 15-16. The word "binding" in § 252(a), however, is only a descriptive reference to § 251(c), which imposes the legal obligation on incumbent carriers to enter into these agreements. Ameritech cannot use this word to bootstrap obligations imposed by § 251 into § 252. As § 252's title suggests, its scope is limited to "[p]rocedures for negotiation, arbitration and approval of agreements." The body of § 252 likewise deals only with such procedures; it is silent regarding anything that occurs after the approval process ends.

In addressing what Congress must have meant, rather than what it said, Respondents make two errors. First, they run afoul of the analysis prescribed in *Ardestani v. INS*, 502 U.S. 129 (1991), for construing statutory language that limits an exercise of authority to situations occurring "under" a specified statute. Respondents' attempts to distinguish *Ardestani* are unpersuasive. In *Ardestani* the Court considered the availability of an award of attorney's fees restricted by stat-

[1] All statutory references in this brief will be to sections of Title 47, United States Code, unless specifically cited otherwise.

ute to a party who prevailed in an administrative proceeding conducted "under" 5 U.S.C. § 554. That section, like 47 U.S.C. § 252, set forth certain procedures and specified the kinds of cases to which they applied. 502 U.S. at 132-33. Observing that the deportation proceeding at issue was not subject to the Administrative Procedure Act ("APA") (including 5 U.S.C. § 554) because immigration proceedings had been exempted from the APA by another statute, the Court concluded that the proceeding at issue was not one conducted "under" 5 U.S.C. § 554. 502 U.S. at 134.

Ardestani rejects just the sort of policy arguments that Respondents offer here. The Court held that, in the absence of a "conclusive statement" of legislative history indicating that the "unqualified reference to a specific statutory provision mandating specific procedural protections" should not limit the applicability of the fee provision, that limitation was exclusively expressive of congressional intent. *Id.* at 136. The Court disapproved essentially the same argument Respondents advance here, namely "that a functional interpretation of [the statute] is necessary in order to further the legislative goals underlying the statute." *Id.* at 137-38. The Court agreed that the statute's "broad purposes" would be served by applying it outside its textual limits, but held that the text governed, adding that a narrow reading was particularly appropriate where a waiver of sovereign immunity, *i.e.*, the authorization of an award of attorney's fees against the United States, underlay the application of the statute. *Id.* at 137, 139. Similar immunity waiver concerns in this case also support a narrow reading of §252(e)(6).

Respondents follow the path rejected in *Ardestani*. They point to no legislative history to support their claim that § 252 should be applied to proceedings in which anything other than negotiation, arbitration or approval occurs. Instead, Respondents proffer "functional" reasons to read the statute more broadly, *e.g.*, that it would lead to results con-

sistent with their view of sensible regulatory policy. This approach contravenes settled rules of construction that, contrary to the claim of Respondent WorldCom Technologies, *et al.*, ("WorldCom Br.") at 27, Petitioners (in their initial Brief at 17-18) have supplied: "strict fidelity to [the] terms" of federal judicial review provisions in light of the limited jurisdiction of federal courts and rejection of "functional" interpretations unsupported by statutory language or "conclusive" legislative history. The question is not, as posed by the United States (US Br. at 25), whether Congress meant to preclude federal court review of interpretation rulings; it is instead whether § 252 granted such jurisdiction. Respondents' arguments are no more than pleas for the kind of interpretation rejected in *Ardestani*.

Respondents' second error is that they have misconceived the intent behind Congress' passage of the 1996 Act. Although the Act substantially changed the regulation of local telecommunications, Respondents do not recognize the nature of that change. They argue that the Act elevates uniformity in the terms under which they deal with one another as competitors above all else, including competition itself, and claim that federal court review is necessary to assure that all local service providers -- whether incumbents or those seeking network access -- deal with one another on such identical terms. Perhaps conceding that § 252(e)(6) is indeed limited to the process of forming and approving agreements, Respondents first claim that interpreting contracts after they have gone into effect is really modifying and thus reforming them, something that would come as a surprise to any first-year law student. *See, e.g., Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990).[2] Indeed, in light of the

[2] There is even less basis, in experience or in the record of this case, for the suggestion of Respondents AT&T, *et al.* that parties intentionally "defer" issues until the interpretation process. AT&T Br. at 21.

widely-recognized distinction between the formation and interpretation of a contract, every circuit to address the issue has held, as WorldCom notes (WorldCom Br. at 29), that the interpretation of an interconnection agreement involves issues of state, and not federal, law. Ultimately, Respondents' true contention is that what Congress calls "agreements" in §§ 251 and 252 are not really agreements at all, but are more like tariffs specifying universally available terms.

That disputes over the language in interconnection agreements can have substantial consequences for the parties is not surprising and does not differentiate these agreements from contracts generally. When problems arise in contract negotiations they are settled (or not) by the parties, but when they arise after a contract is in force, they are resolved either between the parties or in state courts. Thus the fact that the timing of a dispute may affect the forum in which it is resolved is an unremarkable notion. That notion does not justify the conclusion that, despite the obvious distinction between formation and interpretation, Congress necessarily intended to treat them the same. And even if there are instances in which adjudicators genuinely modify agreements, this case, in which the Illinois Commerce Commission ("ICC") considered claims of breach of contract and based its ruling on the language of the agreements (which it then found to be in harmony with federal law, Jt. App. 112a-118a), is not one of those cases.[3] The real danger of "ma-

[3] Respondents' repeated reliance on the ICC's reference to § 252 in its order as an admission of federal jurisdiction is misplaced. The ICC cited § 252, as well as Illinois law, only in observing that its jurisdiction to interpret the agreements was "not disputed." The ICC also cited *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *rev'd on other grounds*, *AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999). Jt. App. 112a. In that case, which concerned a challenge to FCC rules, the Eighth Circuit observed that state commissions "retain the primary authority" to interpret

nipulation" in these cases is not that timing may dictate the forum for review of state commission determinations, but that parties to an agreement will try to create a basis for federal jurisdiction by recasting a dispute over interpretation as a "reformation." *See, e.g., Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Intern. Union, AFL-CIO*, 20 F.3d 750, 755 (7th Cir. 1994) (Cudahy, J., concurring) ("By framing this question as one of a 'meeting of the minds,' Colfax tries to turn an ordinary question of interpretation into one of formation, and thereby get out from under the arbitration clause.").

Although it could have done so, Congress did not impose or authorize universal terms of access in § 251. Instead, it chose the contract, the embodiment of the individual business relationship, as its vehicle to introduce competition into local telecommunications. This choice demonstrates that the 1996 Act represents a turn away from older regulatory models, which operate on universal terms (such as tariffs), toward a "new paradigm [that] seeks to subject to ordinary contractual relations all common carrier and public utility services that can be provided by multiple competing providers." Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1363 (1998). This "new paradigm" is "manifested most clearly in" the 1996 Act. *Id.* at 1323. Moreover, these changes in regulatory policy are not confined to altering the relationships between providers and end-users. Un-

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and enforce interconnection agreements and added in dicta that federal district courts could review those determinations, 120 F.3d at 804 and n. 24. The ICC's citation clearly referred to the statement regarding "retain[ing]" jurisdiction, as the later reference to the case (Jt. App. 121a) made clear. Because jurisdiction was undisputed, the ICC had no occasion to consider whether it was conferred by, or simply left undisturbed by, § 252.

der schemes like the Act, regulation of the relationships among competing providers focuses on the general terms under which the parties will conduct their relationships, leaving later disputes to be worked out in ways more customarily associated with traditional businesses. *See id.* at 1361 ("where [regulatory] intervention occurs, the role of the regulator is more likely to consist of setting the background rules that help define the industry's structure than superintending the competitive behavior of rival providers or the details of transactions within that industry.").

A proper assessment of congressional intent contradicts Respondents' assertions that federal court review is as necessary after a contract is approved as it is during the approval process. The most natural conclusion from the absence of any provision in § 252(e)(6) for review of decisions made after approval is that the need for such review vanishes once access to networks, the Act's principal means to introduce competition in this area, is accomplished by the implementation and approval of an agreement. The fact that approval does not represent the "endpoint" of all possible disputes (Ameritech Br. at 24) misses the point; under the Act, approval of an agreement marks the end of the process of defining the relationship among the parties in a contract (the "background rules") and of the need for federal court supervision of the parties' relationship.

Several other points made by Respondents can be addressed briefly. The Court owes no deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the decision of the Federal Communications Commission ("FCC") in *Starpower Communications*, 15 FCC Rcd. 11,277 (2000), that *it* had jurisdiction to interpret agreements under §252(e)(5) after Virginia's state utilities commission declined to do so. The FCC relied solely on appellate court opinions regarding courts' jurisdiction -- that is, on the same arguments under review in this

case. The Court owes no administrative agency, even one with a regulatory role in the area, deference regarding a question of federal court jurisdiction. *Murphy Exploration and Production Co. v. Dep't of the Interior*, 252 F.3d 473, 478-80 (D.C. Cir. 2001); *Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 757 (2001); *cf. FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (statutes authorizing agencies to litigate in federal courts are not "the sort of provisions that can be said to be within the province of the agency to interpret.").

Ameritech is also wrong in claiming that the incorporation of the 1996 Act's definitions of reciprocal compensation into the agreements at issue justifies federal court review (Ameritech Br. at 28). Parties to a contract cannot create federal jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 29 (1982). The ICC and Illinois' reviewing courts are obliged to follow federal law in interpreting agreements and to assure that nothing the ICC decides is inconsistent with the aims of the 1996 Act, but that duty is not imposed by the contents of the agreements, nor do they confer unnecessary jurisdiction on the federal courts to enforce it. Indeed, the ICC adhered to these principles in this case, initially considering the language of the contracts in reaching its decision (Jt. App. 112a-114a) and then reviewing that determination for consistency with the Act and FCC pronouncements (Jt. App. 114a-117a). Illinois courts are both able and required to do the same, assuring that rulings interpreting interconnection agreements will not frustrate the Act while remaining consistent with its approach to these agreements as defining individual business relationships.

This approach, under which consistency with federal law is assured not by conferring federal court jurisdiction (which the Act does not in interpretation cases), but by relying on

state courts to follow federal substantive law, is both consistent with the Act and not unlike another federal statute that imposes federal duties on private parties to contracts without conferring federal jurisdiction, *i.e.*, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983) (FAA creates federal substantive law establishing and regulating duty to arbitrate, but leaves primary enforcement of that duty to state courts construing contracts). The operation of federal arbitration laws demonstrates that federal jurisdiction is not viewed by Congress as necessary to obtain consistency with federal law or policy in the regulation of competing and contracting businesses. It is no more necessary under the "new paradigm" for utilities regulation embodied by the 1996 Act.

II. ILLINOIS WAS NOT "INVITED" TO PARTICIPATE IN LOCAL TELEPHONE REGULATION AND DID NOT "OPT" TO WAIVE ITS ELEVENTH AMENDMENT IMMUNITY KNOWINGLY OR VOLUNTARILY.

Respondents have failed to demonstrate that the State of Illinois constructively waived its Eleventh Amendment immunity, either knowingly or voluntarily. Their description of a scheme in which state commissions gratefully accept Congress' largesse and voluntarily enlist as "deputized federal regulators" (Ameritech Br. at 38) to enforce interconnection agreements, knowing full well that they subject themselves to federal lawsuits, simply does not reflect the contents of the 1996 Act. That statute, and particularly its local telephone provisions, speaks in mandatory terms regarding the functions of state commissions. Constructive waivers, by contrast, must be explicitly requested and made, and voluntarily made at that. Without statutory language or legislative history to support it, Respondents ask the Court to deem Congress to have done something it did not do.

Like the Seventh Circuit, Respondents again make little effort to advance a text-based argument for constructive waiver. They assert instead that the 1996 Act simply "must be understood" (US Br. at 14) to have provided that state commissions would be defendants in federal suits and that such suits are the "implication" of the statute (AT&T Br. at 41), though not said "in so many words" (US Br. at 34). As a State, however, Illinois was entitled to exactly "so many words" as were necessary to make "unmistakably clear in the language of the statute," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), that it was being asked to give up its constitutional protection. Arguments that implied invitations to waiver based on statutory structure satisfy the "clear statement" rule were rejected in *Dellmuth v. Muth*, 491 U.S. 223 (1989), and in that case even Justice Scalia, providing the fifth vote for reversal, construed the rule to require, if not express reference to suit against States, at least "statutory text that clearly subjects States to suit," *id.* at 233 (Scalia, J., concurring). As Petitioners noted in their initial Brief at 31, § 252 at most confers jurisdiction on district courts to review certain decisions of State commissions, but identifies no parties other than the "aggrieved" plaintiff. Respondents' analogy to the FCC hardly proves their point; the ICC, a state agency, is entitled to the protection of the "clear statement" rule, whereas the FCC, a creature of Congress, is not.

Respondents' constructive waiver arguments depend on repeated assertions that Congress had the authority to exclude state commissions from the regulation of local telecommunications and then invite them to return if they consented to have their decisions reviewed in federal courts. The proposition that Congress actually did either of these things finds no support in the 1996 Act itself. As Petitioners observed in their initial Brief at 36-37, the Act permits preemption only where it is made explicit, such as when a

state commission "fails to act" under § 252(e)(5).[6] Recognizing the absence of such explicit language, two Respondents suggest that it was enough that Congress "could have" preempted the States from local telephone regulation (Ameritech Br. 37, AT&T Br. at 43). If accepted, this proposition would allow Congress to subject States to federal suit wherever it possessed preemptive authority, whether it had actually exercised that authority or not.

Respondents attempt to satisfy the requirement of *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) that waivers be voluntary by arguing that, given Congress' preemptive power over local telephone regulation (whether actually exercised or not), the ICC's adjudication of the complaints brought by the private Respondents should be deemed the acceptance of a Congressional invitation to participate in such regulation. Despite the words actually used in § 252, Respondents insist that state commissions received in that section an "offer" (Ameritech Br. at 32, AT&T Br. at 40) or an "invitation" (WorldCom Br. at 47) or were "invited" (U.S. Br. at 31, AT&T Br. at 1) to participate in local telephone regulation under the 1996 Act, that they were "free to decline" (U.S. Br. at 13) these invitations, but that the ICC voluntarily "opt[ed]" (AT&T Br. at 9) in, consenting thereby to subject itself to federal suit.

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[6] Respondents similarly point to no language preempting Illinois law that requires the ICC to adjudicate complaints, see Petitioners' Br. at 37. That Virginia has declined to do so demonstrates no more than that its commission believes Virginia law allows it to. Further, contrary to the contention of Ameritech, Br. at 39 n. 13, the Illinois statutes that require the ICC to adjudicate complaints, 220 ILCS 5/10-108, 10-109 and 10-110, were enacted well before the 1996 Act and thus could not express any view on Illinois' part regarding the Act's federal review provisions.

The statute itself does not contain these words or anything remotely like them. As set forth in Petitioners' initial Brief at 36-37, § 252 directs state commissions to arbitrate and approve agreements in mandatory terms, prescribing what a state commission "shall" do and declaring that a state commission that does not do so "fails to act to carry out its responsibility," § 252(e)(5). By using the "mandatory 'shall,'" § 252 excluded the possibility that participation in regulation under the 1996 Act was something state commissions were "invited" to do. *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *id.* at 248 (Stevens, J., dissenting) ("the words 'may be reduced' do not mean 'shall be reduced'"); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("If we do our job of reading the statute whole, we have to give effect to this plain command ["shall"]... even if doing that will reverse the longstanding practice under the statute and the rule.") (citations omitted); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).[7] That language cannot can be read as "inviting" state commissions to act or to regard their doing so as the voluntary exercise of a right to consent to federal suit. The Act's language cannot be read to request a voluntary waiver of Eleventh Amendment immunity.

In addressing Petitioners' arguments that constructive waivers of Eleventh Amendment immunity did not survive *College Sav. Bank* (Pet. Br. at 33-34) and that the power exercised by Congress in enacting the 1996 Act was not that of offering a "gratuity" (*id.* at 35-36), Respondents rely principally on their preemption claims. They do not otherwise address the Court's distinction, 527 U.S. at 686-87, between the power to bestow things of value like money, *e.g., South Dakota v. Dole*, 483 U.S. 203 (1987), or the approval of a compact, *e.g., Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and regulatory or even "preemptive" power. The latter is inherently coercive, as the Court recognized in *College Sav. Bank* in distinguishing between powers exercised to grant benefits to States and those used to exclude them from "otherwise lawful activity." 527 U.S. at 687. There is no less danger of coercion when the same unilateral exercise of power is relied on to make the activity "unlawful" in the first place.

To the extent they are relevant to this case at all, *Petty* and *Dole* merely underscore the importance of the "clear statement" rule in assuring knowing and voluntary waivers, even where the power exercised is donative rather than regulatory. They show how, like waivers of constitutional rights generally, waivers of sovereign immunity, by conduct or otherwise, require that the scope of the waiver sought must be made clear before a knowing and voluntary waiver can occur. In *Petty*, the interstate agreement that Congress approved under the Compact Clause, U.S. Const., art. 1, § 10, explicitly addressed the suability of the commission the agreement created. In response, Congress, in approving the compact, specifically provided that the compact's language would not diminish the jurisdiction of any federal court. 359 U.S. at 277-78. Accordingly, the States and Congress spoke to one another about whether and how the States' commission could be sued before the States accepted and acted upon the compact. *See id.* at 280 ("[Congress] approved a sue-and-be-sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have."); *see also Dole*, 483

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[7] In *Yungkau*, the statute at issue used both "shall" and "may," reinforcing the Court's reading of "shall" as mandatory. 329 U.S. at 485. "May" appears several times in § 252, *see, e.g.*, § 252(b)(4)(B) (state commission may require parties to provide information needed for arbitration); § 252(g) (state commission may consolidate proceedings); § 252 (h) (state commission may charge reasonable fee for approval and filing of agreements), suggesting that, where "shall" was used instead, it was meant to have its mandatory meaning.

U.S. at 209 ("The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress."). This sort of dialogue between the State of Illinois and Congress is entirely absent in this case. Congress' action in passing the 1996 Act was unilateral, and, as discussed above and in Petitioners' initial Brief, the Act did not address the suability of State agencies or officials at all, especially not in the context of review of interpretation decisions. Thus, unlike *Petty* and *Dole*, there is no antecedent pronouncement or exchange in this case upon which to base a conclusion that the ICC's actions represented a knowing and voluntary waiver.

Respondents also lean heavily on certain statements in *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 378 n.6 (1999), in advancing the preemption arguments on which their constructive waiver claims rely. The issue in that case was, of course, the extent of FCC rulemaking power in the area of local telecommunications, not whether certain state commission proceedings come within § 252 or whether state commissions are constitutionally immune from federal suits. In placing such weight on a footnote in a case addressing different issues, Respondents have ignored the Court's warning against assigning undue precedential value to statements it has made about jurisdiction in cases where that jurisdiction is not at issue. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998).

In any event, footnote 6 in *Iowa Util. Bd.* must be read in conjunction with qualifying statements made by the Court in that case. For example, the Court observed that, while the Act "has removed a significant area from the States' *exclusive* control," where it had "remained silent," § 152(b), which had assigned responsibility for local telephone regulation to States, "continue[d] to function," 525 U.S. at 381 n. 8 (emphasis added). The Court also noted that the Act had "entrusted" the approval of interconnection agreements to

state commissions under § 252(e) but added that the FCC could issue rules "to guide the state-commission judgments" in that area. *Id.* at 385. Finally, in responding to arguments made in dissent in defense of general state commission authority free of FCC rulemaking in areas including the approval of interconnection agreements, the Court passed as close as it came to the issues in this case, noting that, "constitutional impediments aside," a federal regulatory scheme that left policymaking to state agencies that were "beyond federal control" was a "decidedly novel" design. *Id.* at 385 n. 10. Taken together, these statements demonstrate that footnote 6 does not resolve the issues in this case, especially not whether "constitutional impediments" like the Eleventh Amendment interfere with the operation of § 252(e)(6).

Finally, Ameritech wrongly denigrates state interests when it relies on a federal interest it terms "unique." Ameritech Br. at 38. The state interests at stake here are far more important than those involved in the college savings plan in *College Sav. Bank* and the railroad in *Parden v. Terminal Ry.*, 377 U.S. 184 (1964); they include not only Illinois' constitutionally-protected right to be free of federal suit under the Eleventh Amendment, but also its core interest in continuing to regulate local telecommunications through the ICC and its courts, as it has done for decades. Nothing in *College Sav. Bank* suggests that the bar for waivers of Eleventh Amendment immunity is lowered because of the relative strengths of federal and state interests; indeed, the rejection in *College Sav. Bank* of the "market participant" exception to the constructive waiver rule, 527 U.S. at 679-80, suggests the contrary. Ameritech's argument, if accepted, would lead to the irony pointed out so well by the States of New Jersey, *et al.*, in their brief as *amici curiae* in this case, namely that Illinois would be safer from federal suit running a telephone company than regulating one. Brief of State of New Jersey, *et al.*, at 19.

III. THE ELEVENTH AMENDMENT AND THE 1996 ACT ITSELF BAR A SUIT UNDER *EX PARTE YOUNG* BASED ON AN ALLEGATION THAT OFFICIALS MISAPPLIED FEDERAL LAW WHEN THOSE OFFICIALS ARE PART OF A REGULATORY APPARATUS DESIGNED TO CORRECT SUCH ERRORS.

Respondents misapprehend both the nature of the Court's holding in and the nature of Petitioners' reliance on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Respondents argue that *Larson*, which concerned the sovereign immunity of the United States, does not apply to a case in which state officials are sued. But *Larson* did not concern the *source* of the authority for the actions challenged in that case. Instead, the Court focused on the *character* of the activity in relation to the scope of that authority, without regard to its source, in holding that a suit seeking to enjoin that activity was directed against the sovereign itself and therefore barred by immunity. *Id.* at 690-91. Accordingly *Larson*, *id.* at 687 n. 6, relied on *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), which discussed the Eleventh Amendment's protection of States from federal suit in considering the Court's jurisdiction over controversies in which the United States was a party and concluded that the same rule that applied to States, *i.e.*, that whether a suit is in fact against the State is to be determined by the result of the decree and not merely who is named as a defendant, should apply as well to cases where federal officials are sued. 185 U.S. at 386-87.

The Court has since relied on *Larson* in considering Eleventh Amendment immunity, most notably in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 112-15 (1984). *Pennhurst* cannot be distinguished from this case because a state law violation was alleged. The *Pennhurst* Court relied on *Larson* for what it said about the nature of the official action at issue, namely that "an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it." 465 U.S. at 113. The Court did not find *Larson* inapplicable because it involved a different sovereign or source of authority. *Pennhurst*, *Larson* and *Hitchcock* demonstrate that the principle that an official who has made an alleged error in the application of laws he is charged with applying has not "violated" that law, and that suits challenging such conduct are directed at the sovereign, whether federal or state.[8]

Contrary to Respondents' contention, moreover, suits against members of the ICC are not necessary to vindicate the Supremacy Clause, U.S. Const., art. VI, cl. 2. Respondents portray the ICC in isolation rather than as a part of a complete state regulatory apparatus that includes a right of appeal to courts that will assure consistency with federal law. Illinois' courts of review are not merely available to provide a "prompt and effective remedy," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring) (internal quotations omitted); they hear appeals from ICC decisions under the Illinois Public Utilities Act, the same state statute that authorizes the ICC to act in the first place. *See* 220 ILCS 5/10-201 and 202. It was for this reason that the Court in *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951), barred a suit in federal court to enjoin members of a state utilities commission from enforcing an order of that commission. While the Court did note that *Ex parte Young*, 209 U.S. 123 (1908),

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[8] Nothing said in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) contradicts that principle. In fact, the dissenting opinion therein relied on Larson in that Eleventh Amendment case, though only for the proposition that a suit under *Ex parte Young*, 209 U.S. 123 (1908), is permitted when a state official's act does "violate" federal law, 521 U.S. at 300 (Souter, J. dissenting).

permitted such suits, *Alabama Pub. Serv. Comm'n*, 341 U.S. at 344 n. 4, it barred the suit because Alabama, like Illinois, provided that an appeal was available as a matter of right as "an integral part of the regulatory process under the Alabama Code." 341 U.S. at 348.[9] Thus, contrary to WorldCom's contention (WorldCom Br. at 36), the absence of responsibility to the "federal executive" does not require that ICC members be suable in federal courts. Indeed, under the federal regulatory system the executive is not relied on to control the FCC's decisions in individual cases; that task is similarly assigned to the federal appellate courts under 28 U.S.C. § 2342.

Contrary to Ameritech's contention (Ameritech Br. at 40), the *Alabama* case limited earlier cases in which the Court upheld federal injunctive suits against state commission orders. The Court imposed that limitation in the *Alabama* case to vindicate interests of comity among States and federal courts. 341 U.S. at 349-50. Those same interests support a limitation on the use of federal courts' equitable powers under *Young* against state utilities commissioners where a state regulatory scheme, of which a utilities commission and reviewing courts are a part, can and will correct their errors of law, state or federal, without compromising their status as officials of a sovereign State.

Respondents also attempt to distinguish *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), on the grounds that the statutory scheme at issue there was more "intricate" than that provided by §252(e)(6). The holding in *Seminole Tribe*, however, did not depend on intricacy. Instead, the Court declined to extend the judicially created *Young* doctrine to a

[9] *See also* 341 U.S. at 356 (Frankfurter, J., concurring) ("What the Court today holds is that if a plaintiff can be sent to a State court to challenge an agency order there is no federal court available to him.") (footnote omitted).

case "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right." 517 U.S. at 75. The critical point was Congress' intent as expressed by its specification of a remedy, and not how complicated the remedy was. *See id.* at 75-76 ("[t]he fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter....").

Even under Respondents' broad reading of §252(e)(6), the remedy it provides is significantly more "limited" than those available in a suit in equity that would expose Petitioners to "the full remedial powers of a federal court," *Seminole Tribe*, 517 U.S. at 75. Section 252(e)(6) is limited in its title to "[r]eview of State commission actions," and permits the bringing of an action only "to determine whether the agreement... meets the requirements of [§§ 251 and 252]." At most that provision embodies the familiar concept of judicial review of an administrative agency's rulings, a remedy that does not involve suing officials of those agencies.[10] This limitation is made clearer by the 1996 Act's definition of "state commissions," upon which Respondents Ameritech and WorldCom rely in arguing that the Act provides that state commissioners can be sued. Ameritech Br. at 48; WorldCom Br. at 42. At 47 U.S.C. § 153(41), the Act defines "State commission" to include "the commission, board, or official (by whatever name designated) *which under the*

[10] Notably, Respondents' analogy to federal appellate review of FCC rulings, so prominent in their arguments about the scope of § 252 and the ICC's purported waiver of Eleventh Amendment immunity, is absent from their arguments about *Ex parte Young*. Respondents cannot argue that the ICC should expect to be treated like the FCC and yet claim that its individual commissioners should be subject to general equitable remedies not available under the Act against their federal counterparts.

laws of any State has regulatory jurisdiction with respect to intrastate operation of carriers" (emphasis added). Under Illinois law, upon which the Act's definition depends, no individual ICC commissioner has any jurisdiction. Instead, all actions approved by a majority of commissioners are "deemed to be the finding, order or decision of the Commission." 220 ILCS 5/2-101. Accordingly, even if § 252(e)(6) provided for suit against "State commissions" (which it does not), Petitioners as individual commissioners would not fall within that term. Similarly, the contention of Respondent AT&T (AT&T Br. at 48-49) that injunctions are generally available in federal agency cases is also contradicted by 47 U.S.C. § 401(a), which permits federal courts to grant injunctive relief for violations of the 1996 Act only upon application of the Attorney General. *Conboy v. AT&T Corp.*, 241 F.3d 242, 254-55 (2nd Cir. 2001). Subjecting Petitioners to injunctive suits as individuals would therefore contravene Congressional intent as expressed in the Act and elsewhere in federal telecommunications law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Amici will address the following questions:

Whether a state commission's acceptance of Congress' invitation to participate in implementing sections 251 and 252 of the Telecommunications Act of 1996 constitutes a waiver of Eleventh Amendment immunity.

Whether an official capacity action seeking prospective relief against state public utility commissioners for errors allegedly made in interpreting pre-existing interconnection agreements under the Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States. *Amici* have a compelling interest in opposing federal judicial encroachment on the States' sovereign prerogative to structure their administrative and judicial processes.[1]

The Eleventh Amendment is one of the principal constitutional protections of state sovereignty. The Amendment recognizes that "each State is a sovereign entity in our federal system" and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quotations and citations omitted). As the Court recently reaffirmed, "Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *Board of Trustees of the Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 962 (2001).

The court of appeals reasoned that when a state commission exercises regulatory authority to interpret a telephone interconnection agreement under sections 251 and 252 of the 1996 Telecommunications Act, Congress has provided it with a "gratuity." *MCI Telecom. Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 324, 342 (7th Cir. 2000). The court therefore held that Illinois had constructively waived its Eleventh Amendment immunity from suit in federal district court. This holding ignores the clear instruction of *College Savings Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.*,

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk of the Court. This brief was not authored in whole or in party by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution towards its preparation or submission.

527 U. S. 666 (1999), that "the constructive-waiver experiment . . . was ill conceived" and there is "no merit in attempting to salvage any remnant of it." *Id.* at 680 (citing *Parden v. Terminal Ry. of Ala. Docks Dept.*, 377 U.S. 184 (1964)).

The court of appeals further held that *Ex parte Young*, 209 U.S. 123 (1908), provides an independent basis for the federal district court to exercise jurisdiction over the Commissioners' order in this case, notwithstanding that it was adjudicatory in nature. This holding erroneously expands the scope of the *Young* doctrine to sanction federal court review of a state agency's judicial act. Unless reversed, it will result in federal district courts displacing state appellate Courts as reviewers of state administrative adjudications.

Affirmance of these holdings would result in a highly disruptive expansion of federal court jurisdiction over state proceedings and interfere with the States' sovereign prerogative to structure the relationship between their administrative agencies and their courts. Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. Illinois has not expressly consented to suit in federal court and section 252 does not unequivocally express Congress' intent that a State that regulates interconnection agreements subjects itself to suit in federal court. Section 252 merely establishes "[p]rocedures for negotiation, arbitration, and approval of [interconnection] agreements." 47 U.S.C. § 252. It does not address the enforcement of, or resolution of disputes arising under, previously negotiated and approved agreements. The court of appeals thus erred in holding that Illinois had clear notice that interpreting a pre-existing interconnection agreement would subject the State to suit in federal court.

The most pertinent statutory language states only that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." *Id.* § 252(e)(6). By its plain terms, this provision limits federal court review to state commission actions resolving disputes over the terms of agreements through arbitration, approval and rejection of agreements. And even with respect to these determinations, the statute does not say that the States themselves are suable in federal court. In short, section 252 lacks the clear statement necessary so that a State contemplating regulation can make its choice fully cognizant that its participation will subject it to suit in federal district court.

2. The court of appeals erred in holding that Congress has power under Article I to "extract" a constructive waiver of the State's Eleventh Amendment immunity as a condition of allowing it to regulate. *See* 222 F.3d at 342 (citing *College Savings Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.*, 527 U.S. 666, 686 (1999)). Contrary to the view of the court below, *College Savings* does not establish that Congress can extract a constructive waiver as long as it is providing the States with a gift or gratuity. No decision of this Court has ever held that Congress can condition a grant of federal funds on a State's waiver of its Eleventh Amendment immunity. Rather, the cases have merely assumed the existence of such a power and been decided on statutory grounds. To allow such waivers would violate the principle that " '[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.'" *Board of Trustees of the Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 962 (2001) (citation omitted).

In any event, the court's characterization of a congressional grant of regulatory power as a gift or gratuity is erroneous. If there is any party who is receiving a gift or gratuity when a State agrees to regulate in accordance with federal instructions, it is Congress and the FCC which are spared the substantial costs of setting up a local field office of the federal bureaucracy. Furthermore, the States have regulated local phone service since early in the last century. *See AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 402-03 (1999) (Thomas, J., concurring in part and dissenting in part). Such regulation protects the interests of millions of telephone users and has created enormous constituencies of consumers and interest groups. States cannot realistically abandon regulation when Congress does not preempt all aspects of regulation but leaves substantial areas to the States.

3. The court of appeals erred in holding that *Ex parte Young*, 209 U.S. 123 (1908), provides a basis for Ameritech to challenge the ICC's order in federal district court. While the *Young* doctrine allows a party to bring a federal court suit challenging state legislative and executive action, the doctrine does not allow a challenge to a state judicial act.

Young makes clear that "an injunction against a state court would be a violation of the whole scheme of our government," 209 U.S. at 163, and this Court has subsequently recognized that the States can transfer judicial power to an administrative agency. *Printz v. United States*, 521 U.S. 898, 929 n.14 (1997). It is also well established that an administrative agency engaged in adjudication is performing a judicial act.

The ICC proceeding which Ameritech challenged here was, in every sense, an exercise of judicial power. It commenced when Ameritech's competitors filed complaints with the ICC, and included a prehearing conference, a status hearing, and a full evidentiary hearing with both direct and rebuttal testimony. *See* J.A. 98a-99a. The proceeding

culminated with the ICC's adjudication of the rights of the parties under a pre-existing interconnection agreement. Because the ICC acted as a court in this case, the *Young* doctrine does not permit Ameritech to bring a federal court suit against a state commission challenging its order.

Furthermore, the theory of *Young* that a state officer is stripped of the State's sovereign immunity when violating federal law because he has committed a tortious act is inapplicable in this case. Under the common law, judicial officers are not liable in a civil action for any judicial act committed within their jurisdiction. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). This rule applies to persons who exercise judicial functions within an administrative agency. *Butz v. Economou*, 438 U.S. 478, 514 (1978). Errors committed in the judicial process are corrected on appeal—not by civil actions against judicial officers. Because the common law does not recognize a judicial officer's erroneous interpretation of law to be grounds for a lawsuit, Ameritech's suit against the Commissioners for injunctive relief is barred by the Eleventh Amendment.

ARGUMENT

THE LOWER FEDERAL COURTS LACK JURISDICTION TO REVIEW THE ILLINOIS COMMERCE COMMISSION'S ORDER

The Illinois Commerce Commission (ICC), a state administrative agency with longstanding expertise in the regulation of local telephone service, exercised judicial power granted it under Illinois law when it adjudicated complaints filed against Ameritech, the incumbent local exchange carrier, by several of its competitors concerning the interpretation of their interconnection agreements. Illinois law provides for appeal of the ICC's order in the Illinois Appellate Court, *see* 220 ILCS § 5/10-201(a), and Ameritech filed such an appeal.

Ameritech also challenged the ICC's order by filing suit in federal district court, J.A. 125a, even though a federal district court "does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Chicago, R.I. & P. R.R. Co. v. Stude*, 346 U.S. 574, 581 (1954).[2] The Seventh Circuit nonetheless rejected the Commissioners' Eleventh Amendment defenses and held that both the State and the Commissioners were subject to suit in federal district court. *See* Pet. App. 12a-13a (citing *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir. 1999)).

The court of appeals' holding that Illinois waived its Eleventh Amendment immunity because the acceptance of regulatory responsibility is the equivalent of a "gratuity" is erroneous. Its predicate conclusion that section 252 manifests in clear terms that a State is required to waive its immunity from suit in federal court as a condition of exercising regulatory authority under sections 251 and 252 is irreconcilable with the statutory language. The court's further holding that *Ex parte Young* provides an independent basis for federal court jurisdiction marks an unprecedented and unwarranted expansion of the doctrine and threatens vital principles of federalism. This Court should therefore reverse the judgment of the court of appeals.[3]

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[2] *See also Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 354-55 (1961); *but see City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). *Amici* discuss the inapplicability of *ICS* at p.27, n. 13, *infra*.

[3] *Amici* agree with petitioners' argument that the Commissioners' interpretation of a previously approved interconnection agreement is not a determination subject to federal court jurisdiction under section 252. *See* Pet. Br. Section I.

I. THE ELEVENTH AMENDMENT BARS THE LOWER FEDERAL COURTS FROM REVIEWING THE ICC'S ORDER

This Court has long recognized that " 'although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." ' " *Florida Prepaid Postsecondary Ed. Exp. Bd. v. College Savings Bank*, 527 U.S. 627, 634 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890))). In *Florida Prepaid* the Court reiterated that this presupposition "has two parts: first, that each State is a sovereign entity in our federal system; and second, that ' "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." ' " *Id.* at 634 (citations omitted). Thus, " '[f]or over a century, [the Court has] reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." ' " *Id.* (citations omitted). It has also "long been settled" that the Eleventh Amendment immunity applies "not only [to] actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (citations omitted).

In *Seminole Tribe*, the Court held "that Congress may not abrogate state sovereign immunity pursuant to its Article I powers" such as the Commerce Clause. *Florida Prepaid*, 527 U.S. at 636; *see also Seminole Tribe*, 517 U.S. at 72-73. The Court has also made clear that "constructive waiver" and "abrogation" are functional equivalents. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.*, 527 U.S. 666, 683 (1999) ("Forced waiver and abrogation . . . are

the same side of the same coin."). Thus, where Congress acts pursuant to its Article I powers, a State can be sued in federal court only if it has expressly and affirmatively consented to suit in federal court. *See id.*

The test for consent " 'is a stringent one.' " *Id.* at 675 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). As consent to suit requires a "voluntary" act on the part of the sovereign, a State must either "voluntarily invoke[]" the jurisdiction of the federal courts, or "make[] a 'clear declaration' that it intends to submit itself to" the jurisdiction of the lower federal courts. *Id.* at 675-76 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). And because waiver of Eleventh Amendment immunity involves the relinquishment of a constitutional privilege, "the Court will find waiver . . . 'only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' " *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 473 (1987) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (other citation omitted)).[4]

In this case, Illinois has neither "expressly consented to being sued in federal court," nor "affirmatively invoked" the jurisdiction of the lower federal courts. *College Savings*, 527 U.S. at 676. Instead, the court of appeals premised its finding of "constructive waiver" on the notion that Illinois did so by agreeing to participate in the federal regulatory program

[4] The Court has thus held that "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation," *College Savings*, 527 U.S. at 676 (citing *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900)), "by stating its intention to 'sue and be sued,' " *id.* (quoting *Florida Dept. of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (*per curiam*)), or "by authorizing suits against it " 'in any court of competent jurisdiction.' " *Id.* (quoting *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946)).

enacted by Congress in sections 251 and 252 of the 1996 Telecommunications Act. *See, e.g., MCI Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 341-44 (7th Cir. 2000); *MCI Telecom. Corp. v. ICC*, 183 F.3d 558, 566-67 (7th Cir. 1999) (on rehearing).

While the Court once indicated that a State could be deemed to have waived its Eleventh Amendment immunity by participating in a commercial activity subject to federal regulation, *see Parden v. Terminal Ry. of Ala. Docks Dept.*, 377 U.S. 184, 192 (1964), the Court has "never applied the holding of *Parden* to another statute." *College Savings*, 527 U.S. at 680. *See also Welch*, 483 U.S. at 478 n.8; *Employees of Dept. of Pub. Health and Welfare v. Department of Pub. Health and* Welfare, 411 U.S. 279 (1973). In *College Savings*, the Court recognized that *Parden* was premised on the erroneous "notion that state sovereign immunity is not constitutionally grounded" and that to "recogniz[e] a congressional power to extract constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*." 527 U.S. at 682-83.

In *College Savings*, the Court also responded to the United States' assertion that this Court has in "two other contexts" permitted "Congress, in the exercise of its Article I powers, to extract 'constructive waivers' of state sovereign immunity." *Id.* at 686-87 (discussing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (compact clause); *South Dakota v. Dole*, 483 U.S. 203 (1987) (spending clause)).[5]

[5] *Amici* strenuously disagree with the court of appeals' conclusion that "*Petty*- and *Dole*-style waivers [were] endorsed by the . . . Court in *College Savings*." *See* 222 F.3d at 342. The Court was merely responding to assertions of the United States, and did not "endorse" anything. *See* 527 U.S. at 686-87. *Dole*, of course, was not even an Eleventh Amendment case. *See* 483 U.S. at 205.

The Court, however, declined to follow these cases, explaining that these exercises of congressional power were "fundamentally different" from the case before it which involved Congress' conditioning of the State's right to participate in otherwise lawful activity on the relinquishment of their Eleventh Amendment immunity. *See* 527 U.S. at 686-87. It reasoned that *Petty* and *Dole* involved the granting of a gratuity and not the imposition of a sanction. For example, under the Compact Clause, "States *cannot* form an interstate compact without first obtaining the express consent of Congress." *Id.* at 686. Likewise, "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Id.* at 686-87.

2. The court of appeals' analysis properly began with the threshold question of whether Congress had "unequivocally" expressed its intent that waiver of Eleventh Amendment immunity was a condition of the States' participation as " 'deputized' federal regulator[s]." *See MCI v. Illinois Bell*, 222 F.3d at 340-342, 344. The court acknowledged that this Court "has required 'an unequivocal expression of congressional intent' to obtain an Eleventh Amendment waiver from states," *id.* at 341 (quoting *Atascadero*, 473 U.S. at 238-40); that "Congress must state the condition 'unambiguously,' " *id.* (quoting *Dole*, 483 U.S. at 207, and *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*); and that "Congress must 'speak with a clear voice' so that the states may exercise their choice to waive their immunity 'knowingly, cognizant of the consequences of their participation.'" *Id.* at 340 (quoting *Pennhurst I*, 451 U.S. at 17). The court of appeals then disregarded these principles and invoked "the structure of the pertinent section of the statute" to conclude that it is "clear that Congress intended to provide for federal court review of any regulatory determination made under" Section 252. 222 F.3d at 341.

The court of appeals acknowledged that section 252 "does not contain [an] express waiver" of the States' Eleventh

Amendment immunity. *Id.* Indeed, section 252 merely establishes "[p]rocedures for negotiation, arbitration, and approval of [interconnection] agreements." 47 U.S.C. § 252. In short, section 252's purpose is to get the parties—the incumbent local exchange carrier (ILEC) and competing local exchange carriers (CLECs)—to an agreement. The statute simply does not address the enforcement of, or resolution of disputes arising under, previously negotiated and approved agreements, as is the case here.

Moreover, the most pertinent statutory language states only that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." *Id.* § 252(e)(6). By its plain terms, this provision limits federal court review to those instances "in which a State commission makes a determination under this section," thus contemplating *at most* review of State commission actions in resolving disputes over the terms of agreements through arbitration, approval and rejection of agreements.[6] *Id.* This conclusion is buttressed by subsection 252(e)(4), which provides that "[n]o State court shall have jurisdiction to review the action of a State commission in *approving or rejecting an agreement under this section.*" *Id.* § 252(e)(4) (emphasis added).

Furthermore, even when a state commission has made a determination under section 252, the statute does not say that the States themselves are suable in federal court. *See id.* Subsection 252(e)(6) provides only that the aggrieved party

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[6] Indeed, Congress did not define what constitutes a "a determination under" section 252. Congress used the term "determination" and its root "determine" only in the provisions related to "[p]ricing standards," *see* 47 U.S.C. § 252(d), thus suggesting an even narrower scope of federal court review.

"may bring an action . . . to determine whether the agreement or statement meets the requirements of" sections 251 and 252. It does not state that a party can bring an action to determine whether the state commission violated federal law in approving or rejecting an agreement. As there are two parties to every interconnection agreement—the CLEC and ILEC, who have strong economic interests in obtaining the most advantageous terms possible under federal law—there is no need to subject a state commission to the coercive process of a federal district court suit, with all the disruption of the federal-state balance that results.[7] In short, section 252 lacks the clear statement necessary so that a State contemplating service as a deputized federal regulator can choose to regulate (or not), fully cognizant that Congress intended that its interpretation of pre-existing interconnections agreements would subject it to suit in federal district court.

While acknowledging the lack of "express waiver language," the court of appeals asserted that the structure of section 252 "nevertheless makes clear that Congress intended to provide for federal court review of any regulatory determination made under this section." 222 F.3d at 341. According to the court, "if a state commission does not carry out its responsibilities under § 252, the FCC will act in place of the state commission," and "the exclusive remedy for a state commission's failure to act will be the proceedings before the FCC and any judicial review of the FCC's actions." *Id.* (citing 47 U.S.C. § 252(e)(5) & (6)). The court thus reasoned that:

> under the terms of § 252, the state commission or, if that body chooses not to act, the FCC will exercise regulatory authority over interconnection agreements. That administrative action, whether taken by a state administrative tribunal or by the FCC, is subject to review in federal court. If the reviewing body is a state commission, the statute provides that the commission's actions are reviewable in federal court under subsection 252(e)(6); if the reviewing body is the FCC, its actions are reviewable in federal court under 28 U.S.C. § 2342(1).

[7] A state commission can, of course, voluntarily intervene in federal court or participate as an *amicus curiae*.

Id. Evidently, the court concluded that because any action taken by the FCC under section 252 is reviewable in the federal courts, Congress sought a form of procedural and remedial equivalence by subjecting state commissions to suit in the federal district courts.

Jurisdiction to review the FCC's orders, however, lies in the United States courts of appeals. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402. Such a proceeding takes the form of a "petition to review," 28 U.S.C. § 2344, and is "heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency." *Id.* § 2347(a). It is an appeal and not a "civil action[]," which is subject to the original jurisdiction of the federal district courts. *See* 28 U.S.C. § 1331.

It is thus a non-sequitur to reason that because Congress subjected FCC actions under subsection 252(e)(5) to limited appellate review, the state commissions have clear and unequivocal notice that they can be hauled into federal district court. The FCC is Congress's creation. Congress can subject FCC orders to whatever system of judicial review it chooses, and it chose appellate review. Yet if the Seventh Circuit's construction is correct, Congress intended to subject the state commissions to the far more intrusive process of district court litigation, notwithstanding that the commissions are sovereign entities whose immunity from suit is a constitutional privilege. This, according to the court below, is the price Congress imposed on the States for assisting in the implementation of a federal regulatory program by adjudicating what is in essence a commercial dispute.

Affirmance of this result would, of course, fundamentally alter the federal-state balance. The structure of the Act thus provides no basis for departing from the settled rule that Congress must provide an unequivocal textual statement that the States waive their immunity from suit in federal court as a condition of helping Congress implement federal policy. *See Atascadero*, 473 U.S. at 239–40; *Pennhurst I*, 451 U.S. at 17.

3. Even if section 252 provides clear notice to the States that their participation in the regulatory scheme subjects them to waiver of Eleventh Amendment immunity, the court of appeals erred in holding that Congress has power to extract such a waiver when regulating pursuant to the commerce clause. In the court of appeals' view, because Congress has power under the commerce clause entirely to preempt state regulation of local phone service, its decision to give States the choice to regulate aspects of local phone service is a "gift or gratuity" to which Congress can attach the condition that the State waive its immunity. 222 F.3d at 344 (citing *College Savings*, 527 U.S. at 686-87). The court of appeals' holding erroneously resuscitates congressional power under Article I to "extract" constructive waivers in a manner contrary to *College Savings*. *See* 527 U.S. at 680, 686. It erroneously characterizes the Court's discussion, which rejected the United States' attempt to save the constructive waiver doctrine, into a holding. *See id.* at 686-87. Finally, it demonstrates a serious misunderstanding of the federal-state relationship and eviscerates the landmark holding of *Seminole Tribe*.

In *College Savings*, the Court addressed and rejected the United States' attempt to revive the doctrine based on its argument that there were "two other contexts in which . . . [the Court has] permitted Congress, in the exercise of its Article I powers, to extract 'constructive waivers' of state sovereign immunity." 527 U.S. at 686. The United States there argued that Congress has power to extract waiver where States seek Congressional approval of an interstate compact,

and where Congress conditions a State's receipt of federal funds on waiver of the immunity. *See id.* (discussing *Petty*, 359 U.S. 275, and *South Dakota v. Dole*, 483 U.S. 203). The Court dismissed the United States' argument as inapposite, distinguishing these exercises of congressional power on the ground that they did not impose a sanction but rather bestowed a "gift or gratuity," which Congress does not have to make and a State does not have to accept. *Id.* at 687. Even then the Court explained that where Congress imposes a condition on the grant of federal funds, " 'the financial inducement . . . might be so coercive as to pass the point at which "pressure turns into compulsion." ' " *Id.* (quoting *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

Contrary to the view of the court of appeals, *see* 222 F.3d at 342, this discussion does not "endorse" the view that Congress has power under Article I to extract a waiver of Eleventh Amendment immunity as long as it provides the States with a "gift." Indeed, no decision of this Court has ever squarely held that Congress can condition a grant of federal funds on a State's waiver of its Eleventh Amendment immunity. *Dole*, for example, did not involve a condition that States waive their Eleventh Amendment immunity. *See* 483 U.S. at 205. *Dole* even recognized "that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id.* at 208.

In *Atascadero*, the Court merely held that the Rehabilitation Act "falls short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." 473 U.S. at 247. Similarly, both *Florida Dept. of Health* and *Edelman* were decided on the ground that the relevant federal law lacked the clear statement required to put the States on notice that Congress was extracting a waiver of their Eleventh Amendment immunity as a condition for participation in the

program. *See Florida Dept. of Health*, 450 U.S. at 149-50; *Edelman*, 415 U.S. at 673-74.

Thus, none of these cases establishes the proposition that Congress can, in the exercise of its Article I powers, extract a waiver as long as it is providing the States with a "gratuity." Such a rule would violate the fundamental principle that " '[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.' " *Board of Trustees of the Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 962 (2001) (quoting *Seminole Tribe*, 517 U.S. at 72-73).[8]

Moreover, *College Savings* did not suggest that a grant of regulatory power enacted pursuant to the commerce power which must be carried out in accordance with federal instructions, is a gift or gratuity. *See* 527 U.S. at 686-87. Indeed, such a characterization is fundamentally flawed. Congress did not offer the States any financial recompense for undertaking to administer sections 251 and 252. If there is any party that has received a gift or gratuity when a State accepts regulatory authority under the Telecommunications Act, it is Congress and the FCC, which are spared the substantial costs of setting up a local field office of the federal bureaucracy.[9]

As Congress did not provide federal funds in exchange for the States agreeing to regulate, the court of appeals was forced to construct an alternative hypothesis. Because Congress could preempt state regulation of local telephone

[8] If the United States is not satisfied with a State's performance of its obligations under a spending clause enactment, it can, off course, sue the State. Such a suit is not barred by the Eleventh Amendment. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

[9] As the Fourth Circuit observed in response to the same argument, " 'Some gift.' " *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 293 n.3 (4th Cir. 2001) (quoting opinion of district court).

service, the court reasoned that "[s]uch regulation is no longer an 'otherwise permissible activity' for states." 222 F.3d at 344. Therefore, "Congress may choose to 'give back' to states some of the regulatory power Congress has taken away, and Congress may attach conditions to the return of that power." *Id.*

This theory rests on a fundamental misunderstanding of the commerce power. As the Court has explained, the Constitution authorizes Congress to "exercise its legislative authority directly over individuals rather than over States." *New York v. United States*, *Id.* 144, 165 (1992). "The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 166. Thus, while "Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* Subjecting States to suits based on their assertedly erroneous administration of federal standards is simply an impermissible attempt to "regulate state governments' regulation of interstate commerce." *Id.*

Indeed, even those who argued in *College Savings* for the retention of some form of *Parden* waivers implicitly recognized the invalidity of such waivers when the State is engaged in regulation. *See* 527 U.S. at 679-80 (summarizing argument of petitioners and United States that "a State is never deemed to have constructively waived its sovereign immunity by engaging in activities that it cannot realistically choose to abandon, such as the operation of a police force; but constructive waiver is appropriate where a State runs an enterprise for profit, operates in a field traditionally occupied by private persons or corporations, engages in activities sufficiently removed from 'core state functions,' or otherwise acts as a 'market participant' in interstate commerce") (other citation omitted).

The Court rejected this argument observing that a "State's mere presence in a field subject to Congressional regulation" does not demonstrate that it has voluntarily waived its immunity. *Id.* at 680. Indeed, the potential for involuntary waiver is even greater where, as here, the activity which purportedly subjects a State to suit is its activity as a regulator in a field historically subject to state authority.

The States have long exercised their police powers to regulate commercial activity generally and telecommunications specifically. "By 1915, most States had established public utility commissions and charged them with regulating telephone service." *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 403 (Thomas, J., joined by Rehnquist, C.J., & Breyer, J., concurring in part and dissenting in part) (citing J. Brooks, *Telephone: The First Hundred Years* 144 (1976)). When Congress entered the field by enacting the Mann-Elkins Act (Act of Jun. 18, 1910, ch. 309, § 7, 36 Stat. 544-45), it did not preempt the States' regulation of intrastate phone service. *See AT & T Corp.*, 525 U.S. at 403 (Thomas, J.). The jurisdictional separation between state and federal authority remained unaltered until the Telecommunications Act of 1996. *See id.* at 403-05 (Thomas, J.). During this period, the States created extensive schemes (comprised of both substantive rules and administrative bodies) to regulate the intrastate aspects of phone service. *See* 220 ILCS §§ 5/13-101-902. It was this "policy expertise" that Congress sought "to take advantage of." 525 U.S. at 412 (Thomas, J.).

Given the longstanding and extensive role played by the States in regulating local phone service, Congress knew full well that the state commissions could not respond to sections 251 and 252 by simply closing up shop. Indeed, because the 1996 Telecommunications Act does not preempt all aspects of the States' regulation of local phone service, but leaves substantial areas, such as the setting of retail rates, within their authority, States were highly unlikely to walk away. *Cf.*

FERC v. Mississippi, 456 U.S. 742, 766 (1982) ("[T]he choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one."). Indeed, it is absurd to suggest that the States can realistically abandon regulation which protects the interests of millions of telephone users.

Contrary to the view of the court of appeals, the state commissions have not "entered into the same kind of exchange with Congress that takes place when Congress offers federal funds conditioned on a state's acceptance of the federal terms." 222 F.3d at 343. The "exchange" is inherently coercive as the enormous constituency of phone users and interest groups protected by state commissions would object strenuously if a State proposed to cease regulation. The court of appeals therefore erred in holding that the Illinois Commerce Commission constructively waived the State's Eleventh Amendment immunity by interpreting a pre-existing interconnection agreement under sections 251 and 252.[10]

II. EX PARTE YOUNG DOES NOT PROVIDE A BASIS FOR FEDERAL COURT JURISDICTION TO REVIEW THE ICC'S ORDER

The court of appeals held that the Ex parte Young doctrine provides an "independent basis" for the carriers to "pursu[e] injunctive relief against the individual members of the state commissions" in federal court. 222 F.3d at 345. According

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[10] As explained *infra* at page 22, in *FERC v. Mississippi*, the Court held that a state agency that exercises adjudicatory powers is required to apply federal law if it has jurisdiction over similar state law disputes. *See* 456 U.S. at 760-61. Thus, in the absence of complete preemption, a state agency that adjudicates disputes under state law, as does the ICC, has no choice but to apply federal law. The State's decision to apply federal law is thus involuntary and cannot be deemed a waiver of the State's Eleventh Amendment immunity.

to the court of appeals, this is a "'straightforward Ex parte Young case[]'" because the commissioners' "determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." *Id.* "Thus," the court explained, "the carriers' suits fit squarely within the traditional framework of Ex parte Young." *Id.*

The court's holding reflects a profound misunderstanding of the *Ex parte Young* doctrine. It marks an unprecedented expansion of the doctrine from the accepted realm of reviewing state legislative and executive action, to interposing the federal district courts as reviewing bodies of state judicial and quasi-judicial proceedings. *See* 17 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 4231, at 559-60 (1988) ("Ex parte Young established the power of the federal courts to enforce the Constitution against state *legislative* and *executive* action.") (emphasis added and footnote omitted).

The lower court's expansion of the doctrine is contradicted by the *Young* opinion itself, and, in any event, cannot be justified by its theory and purpose. It is also contrary to the principles of federal court non-interference with state judicial proceedings as reflected in the Anti-Injunction Act, 28 U.S.C. § 2283, and abstention doctrine. *See Younger v. Harris*, 401 U.S. 37, 43-44 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625-29 (1986) (abstention doctrine based on the "'vital consideration' of the proper respect for the fundamental role of the States in our federal system") (quoting *Younger*, 401 U.S. at 44).

The court of appeals acknowledged that "the present case arises in a slightly different context" than its *MCI* decision, Pet. App. 13a, which arose out of the arbitration and approval of an agreement. *See* 183 F.3d at 561. The court failed, however, to conduct any further examination into the nature

of the ICC proceeding, summarily concluding that all commission actions involving interconnection agreements are reviewable by suits that are "to be brought exclusively in the federal courts." Pet. App. 14a.

This case, however, is far removed from the paradigm of *Ex parte Young*. It is not a challenge to a legislative act. Nor is it a challenge to an executive branch official's authority to enforce a legislative act. *See Young*, 209 U.S. at 132. Rather, it is a challenge to an adjudication, which, while rendered by an administrative agency, nonetheless acted as a judicial body in the underlying proceeding. *Young* simply does not contemplate the exercise of federal court jurisdiction to review the ICC's order in this proceeding. As the Court explained in *Young*:

> [T]he right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government. . . .
>
> The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

209 U.S. at 163.

The Court has, of course, long recognized that "[i]t is within the power of the States, as it is within the power of the Federal Government, to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review." *Printz v. United States*, 521 U.S. 898, 929 n.14 (1997) (citing *Crowell v. Benson*, 285 U.S. 22 (1932)). It is likewise well established that an administrative agency

engaged in adjudication is performing a judicial act. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224-26 (1908). Indeed, that is the very premise of *FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982), which held that *Testa v. Katt*, 330 U.S. 386 (1947), requires a state administrative agency to apply federal law when it adjudicates disputes arising within its jurisdiction. *See* 456 U.S. at 760 ("the [State] Commission has administrative as well as judicial duties"); *see also Printz*, 521 U.S. at 929 n.14 ("We have no doubt that *FERC* would not have been decided the way it was if *non*adjudicative responsibilities of the state agency were at issue."); *FERC*, 456 U.S. at 775 n.1 (O'Connor, J., concurring in part and dissenting in part) (agreeing that *Testa* was controlling because "the Mississippi Public Service Commission has jurisdiction over similar state disputes, and it is settled that a State may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action").

The ICC proceeding which Ameritech challenged here was, in every sense, an exercise of judicial power. It was initiated when various CLECs filed complaints with the ICC against respondent Ameritech alleging that it had failed to pay them reciprocal compensation due for calls to internet service providers under their interconnection agreements. *See* J.A. 52a-95a; *see also id.* at 97a-98a. The cases were consolidated and assigned to a Hearing Examiner—the State's equivalent of an administrative law judge—who conducted a prehearing conference, a status hearing, and a full evidentiary hearing at which numerous witnesses testified. *See id.* at 99a. Other parties were allowed to intervene. *See id.* at 98a. The parties filed both initial and reply briefs, as well as draft orders, and were served with the Hearing Examiner's proposed order. *See id.* at 99a-100a. [11]

[11] The Illinois statute also allows the parties to file briefs in response to the hearing examiner's recommended order. *See* 220 ILCS § 5/10-111.

The ICC's order interpreted the agreements to require respondent Ameritech to pay reciprocal compensation, and ordered relief, which was both retroactive (by requiring the payment of past due compensation) and prospective in nature. *See id.* at 121a-124a. Not only was the form of the proceeding judicial in nature, the proceeding was in every sense an adjudication of the existing rights of the parties and thus a judicial act. *See Prentis*, 211 U.S. at 226 ("A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."). [12]

To be sure, the Court has reserved the question of whether a state administrative body engaged in an adjudication is a court for purposes of the Anti-Injunction Act. *See Gibson v. Berryhill*, 411 U.S. 564, 573 n.12 (1973); *Prentis*, 211 U.S. at 226. Nonetheless, an examination of *Young*'s theoretical underpinnings demonstrates that it does not authorize a suit against state commissioners when they exercise judicial functions.

In *Young*, the Court rejected the assertion of a state attorney general that because he was acting under the authority of the State, he was cloaked with its Eleventh

[12] Appeal of the ICC's order lies in the State's appellate courts. *See* 220 ILCS § 5/10-201(a). Ameritech has filed such an appeal. *See* Pet. 7 n.1. Under Illinois law, "[n]o new or additional evidence may be introduced in any proceeding upon appeal from [an] . . . order or decision of the Commission, issued or confirmed after a hearing, but the appeal shall be heard on the record of the Commission as certified by it." *Id.* § 10-201(d). Review of the ICC's orders is deferential. Its factual findings are reviewed under the "substantial evidence" standard, *id.* § 5/10-201(e)(iv)(A), and the appellate court "will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with its administration and enforcement." *Moncada v. ICC*, 571 N.E.2d 1004, 1009 (Ill. App. Ct. 1991). The appellate court can reverse an ICC order if it "is in violation of the . . . . federal constitution or laws." *Id.* § 5/10-201(e)(iv).

Amendment immunity. 209 U.S. at 159. To this the Court responded:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Id. As the Court has subsequently explained, "[s]ince the State could not authorize the action, the officer was 'stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct.' " *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984) (quoting *Ex parte Young*, 209 U.S. at 160).

Young thus rests on the common law fiction that "'the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character.' " *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 272 (1997) (opinion of Kennedy, J.) (quoting *In re Ayers*, 123 U.S. 443, 502 (1887)); *see also id.* at 288 (O'Connor, J., concurring) ("The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct[.]"). Put another way, "where the individual would have been liable at common law for his actions, sovereign immunity was no bar regardless of the person's official position." *Id.* at 272 (Kennedy, J.).

The *Young* doctrine has a further applicable limit. "As the Court in *Larson* explained, an ultra vires claim rests on 'the officer's lack of delegated power. A claim of error in the

exercise of that power is therefore not sufficient.' " *Pennhurst II*, 465 U.S. at 101 n.11 (quoting *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 690 (1949)). Thus, mere assertions of good faith error in the exercise of lawful authority, such as a tribunal's alleged mistake in the interpretation of an agreement, do not support an action under *Young*.

At the same time, the common law has long recognized "a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). *See also Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). As the Court explained in *Pierson*, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." 386 U.S. at 553054.

For an act within a court's jurisdiction, a judge "cannot be subjected to responsibility for it in a civil action, however erroneous the [a]ct may have been, and however injurious in its consequences it may have proved to the plaintiff." *Bradley*, 80 U.S. (13 Wall.) at 347; *see also* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 1058 (5th ed. 1984) (Judicial immunity "covers all decisions within the general ambit of the judge's authority, even if the decision is clearly wrong on the merits."). Judicial "errors may be corrected on appeal," not by lawsuits against the judge. *Pierson*, 386 U.S. at 554. And because "adjudication within [an] administrative agency shares enough of the characteristics of the judicial process . . . those who participate in such adjudication [are] immune from suits for damages." *Butz v. Economou*, 438 U.S. 478, 512-13 (1978); *cf. id.* at 514 (persons "performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who

complain of error in such proceedings must seek agency or judicial review.").

Ameritech's suit for injunctive relief thus falls well outside the *Young* paradigm. As its federal court complaint states, "the State commission is empowered to enforce the agreements it approves." J.A. 131a (Complaint ¶15). Thus, even if the ICC is analogous to a court of limited jurisdiction, there can be no contention that the Commissioners have acted on a matter that is outside their jurisdiction. The Commissioners clearly possessed power to decide this dispute. Ameritech's suit is based on the Commissioners' asserted violations of federal law in interpreting the agreements. *See* J.A. 140a-144a. But under the common law, the Commissioners cannot be sued for any errors they committ in adjudicating a dispute. *See e.g., Bradley*, 80 U.S. (13 Wall.) at 351. And because "'[a] claim of error in the exercise of that power is . . . not sufficient'" to strip the Commissioners of their official character, Ameritech's suit for injunctive relief is barred by the Eleventh Amendment. *Pennhurst II*, 465 U.S. at 101 n.11 (quoting *Larson*, 337 U.S. at 690).

The need to vindicate the supremacy of federal law does not justify the court of appeals' unprecedented expansion of the *Young* doctrine to authorize the federal courts to review state proceedings which are "judicial in nature." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432-34 (1982). State courts are, of course, required to apply federal law, *see Testa*, 330 U.S. at 394, and are fully able to do so. *See Allen v. McCurry*, 449 U.S. 90, 105 (1980). Indeed, until 1875 Congress did not provide "any kind of general federal-question jurisdiction to the lower federal courts" and "'the state courts provided the only forum for vindicating many important federal claims.'" *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 588 (1995) (quoting *Palmore v. United States*, 411 U.S. 389, 401 (1973)).

The court of appeals' holding is simply an invitation to conflict and confusion. It manifests a shocking disrespect for the integrity of state judicial processes that is contrary to this Court's cases. A federal district court, the Court has observed, "does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Chicago, R.I. & P. R.R. Co. v. Stude*, 346 U.S. 574, 581 (1954). Whatever may be the precise scope of the Court's holding in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), it does not apply here, where Illinois has vested judicial review of the ICC's order in the Illinois' appellate courts and not its trial courts. *See* 220 ILCS § 5/10-201(a).[13]

Moreover, even if the federal district court has jurisdiction over Ameritech's suit, exercising that jurisdiction disregards "the fundamental constitutional independence of the States and their courts." *Atlantic Coast Line R.R. Co. v. Brotherhood of Loc. Engs.*, 398 U.S. 281, 287 (1970). While in this case the Illinois Appellate Court stayed further proceedings pending resolution of Ameritech's federal suit, what if the court had declined to issue the stay? How then would the court of appeals' allocation of appellate authority work? *See* Pet. App. 4a-5a (court of appeals acknowledges that its "allocation of authority has the potential to cause problems").

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[13] This case does not involve an instance in which the State has vested judicial review of an administrative proceeding in a trial court of general jurisdiction. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 159 (1997). Rather, judicial review lies in the Illinois' appellate courts, *see* p. 23 n.12, *supra*, and is thus an appeal rather than a civil action within the original jurisdiction of the federal district court. "Cross-system appellate authority is entrusted to this Court . . . but it is outside the domain of the lower federal courts." 522 U.S. at 177 (Ginsburg, J., dissenting) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923)).

Under the Anti-Injunction Act, the federal courts have no authority to enjoin either the Illinois Appellate Court from deciding the appeal or the parties from litigating the appeal in state court. *See Atlantic Coast Line*, 398 U.S. at 287; *County of Imperial v. Munoz*, 449 U.S. 54, 58 (1980). As this Court has explained, "a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line*, 398 U.S. at 294. The relief Ameritech sought—"a declaration that the [state commission's] Order is invalid and . . . an injunction against enforcement of the Order," J.A. 141a-142a (¶¶ 51, 56)—would require a federal court to do exactly that—enjoin further proceedings in the state courts. *See Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 136 (1941) (Section 2283 applies to "all steps taken in or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings . . . .").[14]

[14] Even when a party invokes 42 U.S.C. § 1983—one of the few "expressly authorized" exceptions to § 2283—the Court has frequently instructed the lower federal courts to refrain from exercising their equitable powers to enjoin pending state proceedings if those proceedings provide an adequate opportunity to raise a federal claim. *See Ohio Civ. Rights Comm'n*, 477 U.S. at 625-29; *Middlesex County Ethics Committee*, 457 U.S. at 431-37; *Younger*, 401 U.S. at 43-49. While the Court has not resolved the issue of whether *Younger* and its progeny require a losing party in a state administrative adjudication to exhaust appellate remedies, in the context of a civil action the Court has held "'that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court.' " *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 369 (1989) (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975)). Respect for the authority of state institutions and processes requires the same result when a party seeks to overturn a state agency's adjudication by a suit for injunctive relief in federal district court.

As the court of appeals candidly observed, its proposed system of federal district court review of state commission interpretations "may not have much to recommend it." Pet. App. 5a. That, coupled with the absence of any statutory support for it, is ample reason to reject it.

The damage to Illinois' dignitary interests caused by federal court intervention in this case is not minimized because the federal district court was determining whether the State's officials had violated federal law. That argument was raised and rejected in *Younger*, *see* 401 U.S. at 39-40; *Middlesex County Ethics Committee*, *see* 457 U.S. at 429; and *Ohio Civil Rights Comm'n*, *see* 477 U.S. at 625. The federal law applicable to interconnection agreements may be complex, but that does not give Congress the right to choose which institutions of state government are to enforce the act. *See, e.g., FERC*, 456 U.S. at 774 (Powell, J., concurring in part and dissenting in part) (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) ("'The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' I believe the same principle must apply to other organs of state government."). *See also Coeur d'Alene Tribe*, 521 U.S. at 276 (Kennedy, J.) ("It is a principal concern of the court system in any State to define and maintain a proper balance between the State's courts on one hand, and its officials and administrative agencies on the other.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

RICHARD L. MATHIAS, TERRY S. HARVILL, EDWARD C. HURLEY, RUTH K. KRETSCHMER and MARY FRANCES SQUIRES, in their official capacities as Commissioners of the Illinois Commerce Commission,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, AT&T COMMUNICATIONS OF ILLINOIS, INC. and FOCAL COMMUNICATIONS CORP.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICUS CURIAE* PENNSYLVANIA PUBLIC UTILITY COMMISSION IN SUPPORT OF PETITIONERS ON THE MERITS

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Pennsylvania Public Utility Commission (hereinafter "Pennsylvania Commission") submits this brief in support of Petitioners Richard L. Mathias *et al.*, pursuant to Supreme Court Rule 37. The Pennsylvania Commission has obtained the written consent of all parties to file this brief.[1]

The Pennsylvania Commission is an administrative agency of the Commonwealth of Pennsylvania. Under the laws of the Commonwealth of Pennsylvania, the Pennsylvania Commission has regulatory jurisdiction with respect to intrastate operations of telecommunications carriers. Accordingly, it is a "State commission" under section 252(e) of the Federal Telecommunications Act of 1996 (the Act).[2]

The issues in this case concern the scope of Federal court jurisdiction under section 252 of the Act. Respondents WorldCom and AT&T oppose the Illinois Commissioners' assertion of sovereign immunity in this case and their Pennsylvania counterparts oppose the Pennsylvania Commission and its commissioners on similar claims in the United States Court of Appeals for the Third Circuit. *Bell Atlantic-Pennsylvania, Inc. v. Pennsyl-vania Pub. Util. Comm'n*, No. 00-2620 (3rd Cir., filed Aug. 30, 2000); *MCI Telecom. Corp. v. Verizon Pennsylvania, Inc.*, No. 00-2257 (3rd Cir., filed July 28, 2000).[3] The questions accepted for disposition by

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[1] No counsel for a party authored the brief in whole or in part and no persons other than the Pennsylvania Commission made a monetary contribution to the preparation of this brief.

[2] 47 U.S.C. § 252(e) (requiring State commission approval of interconnection agreements); 47 U.S.C. § 153(41) (defining "State commission" as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.").

[3] On April 29, 2001, the Third Circuit's Clerk of Courts notified the parties that both Pennsylvania appeals have been tentatively listed on the merits for Thursday, June 21, 2001.

this Honorable Court are broad enough to materially impact the outcome of the two Pennsylvania appeals pending in the Third Circuit. This case is also the Court's first consideration of the application of the sovereign immunity doctrine to the Act. Thus, the Pennsylvania Commission has a vital interest in the disposition of this case.

SUMMARY OF THE ARGUMENT

The Pennsylvania Commission respectfully disagrees with the United States Court of Appeals for the Seventh Circuit on the issue of whether Federal jurisdiction under § 252(e)(6)[4] of the Act is exclusive when it exists. State court review under § 252(e)(6) should be recognized as appropriate when a State commission does not waive the State's sovereign immunity. Such State court review is guaranteed by the Constitution of the Commonwealth of Pennsylvania. Such review is available as of right before the Commonwealth Court of Pennsylvania, an intermediate appellate court within Pennsylvania's Unified Judicial System. Congress has no authority under the Act to interfere with Pennsylvania's system of judicial review.

The Pennsylvania Commission argues that the Act does not constitute "Congress's invitation to participate in implementing a Federal regulatory scheme."[5] The Act does not invite

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[4] Section 252(e)(6) provides in pertinent part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).

[5] Here, the Pennsylvania Commission quotes one of three questions before the Court, namely "Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity."

participation; it mandates participation. State commissions "shall" do this, and "shall" do that. Neither monetary compensation nor opportunity to express a clear intent is provided for in the Act. Nevertheless, states like Pennsylvania share Congress's intent to open local telecommunications markets to the benefits of competition and, thus, have implemented the Act's substantive provisions. State commission cooperation in this regard, however, has its limits.

When the Pennsylvania Commission acts to approve a contract for interconnection between two telecommunications carriers, the commission is engaged in an "otherwise lawful activity" and does not voluntarily waive the Commonwealth's sovereign immunity to private party suit in Federal court. Correspondingly, the commission does not waive the Commonwealth's ability to provide for judicial review of commission orders. Even if a majority of the members of the commission intended to waive immunity and State judicial review, it is not at all certain that the commission could do so. All acts of the Pennsylvania Commission are defined in relation to the Pennsylvania constitution and statutes, including the enabling authority granted to the Pennsylvania Commission by the Commonwealth of Pennsylvania.

Contrary to the Seventh Circuit's view, State commissions like the Pennsylvania Commission are not "deputized federal regulators"[6] and they receive no gift or gratuity from the Federal government in consideration for participation in the Act's regulatory scheme. The theory that a State commission is "deputized" by the Federal government to exercise "federal regulatory authority" independent of the very State government that created the State commission is repugnant to our system of federalism.

Mathias v. WorldCom, 532 U.S. ___ (order entered March 5, 2001) (No. 00-878).

[6] *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000), *cert. denied*, 2001 U.S. Lexis 898.

Similarly, the Pennsylvania Commission respectfully disagrees with the Seventh Circuit's application of the *Ex parte Young* doctrine [7] to allow Federal suit against individual members of a State commission without their consent merely for voting to approve, reject or enforce an interconnection agreement under section 252 of the Act. Even if the majority vote constitutes an error of law, such error is rectified by judicial review in State court and does not suffice to override the sovereign immunity of a State. State courts are perfectly competent to review actions of State commissions for compliance with State and Federal law. The rule in *Ex parte Young* also does not apply because the State is the real party in interest and the constitutional doctrine of sovereign immunity bars suit against State officials when the State is the real party in interest.

ARGUMENT

I. FUNDAMENTALLY, THE SEVENTH CIRCUIT ERRED IN HOLDING THAT FEDERAL COURT REVIEW UNDER § 252 OF THE ACT IS EXCLUSIVE.

The Seventh Circuit read § 252(e)(4) of the Act in conjunction with § 252(e)(6) and concluded that Federal court review is exclusive when it exists. *Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566, 570-571 (7th Cir. 1999), *cert. granted sub nom Mathias v. WorldCom Tech., Inc.*, (U.S. Mar. 5, 2001) (No. 00-878). Section 252(e)(4) provides in relevant part: "No State court shall have jurisdiction to review the action of a State commission." 47 U.S.C. § 252(e)(4). The harm caused by § 252(e)(4) is at the heart of this case as well as the two Pennsylvania cases

[7] *Ex parte Young*, 209 U.S. 123 (1908) (a judicially-created equitable remedy that permits a Federal court review against a state official where such remedy is necessary to protect the supremacy of Federal law).

pending in the Third Circuit and similar cases brought by other State commissions.

The Seventh Circuit's analysis is flawed by its reliance upon § 252(e)(4). Congress acted outside the scope of its Commerce Clause powers [8] when it prohibited State court review of State commission decisions. Congress has no authority under the Commerce Clause to sever the relationship between a State court and a State commission. Having no authority, Congress is prohibited by the Tenth Amendment from requiring State commission decisions to be reviewed in Federal court.[9] A State's ability to provide for State court review of State commission decisions remains in tact and unassailable; the Act's prohibition of State court review is unconstitutional and unenforceable. Accordingly, Federal court review under § 252(e)(6) of the Act is not exclusive when it exists.

Moreover, under the Constitution and statutes of the Commonwealth of Pennsylvania, judicial review of the Pennsylvania Commission's orders is available as of right in the Commonwealth Court of Pennsylvania. Pennsylvania Const., Art. V, § 9 (guaranteeing right of appeal from a state administrative agency to the appropriate State court); 42 Pa. C.S. § 763 (providing for review of agency orders in the Commonwealth Court of Pennsylvania).[10] Already, the

[8] There is no dispute that the Act was passed pursuant to Congress's powers under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3.

[9] U.S. CONST. amend. X. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." There should be no dispute that "the constitution is superior to any ordinary act of the legislature[;] the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison*, 5 U.S. (1-Cranch) 137, 178 (1803).

[10] State laws routinely provide for appeals from State commission decisions to be filed directly and exclusively against State commissions.

Pennsylvania courts have implicitly recognized this right as extending to judicial review of Federal questions under § 252 of the Act. This decision was reached in *Bell Atlantic—Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 763 A.2d 440 (Pa. Cmwlth. 2000) (*en banc*) (disposing of Federal law questions having a direct nexus to § 252 of the Act that were presented to the court by MCI and others telecommunications carriers).[11]

It is well established that State courts are presumed competent to review lower tribunal determinations for compliance with Federal and State law. *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 1491 (2000) (stating that State courts should have "their rightful opportunity to adjudicate federal rights"); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) (noting that State courts "can and do decide questions of federal law"); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (acknowledging "the premise that nothing in the concept of our federal system prevents State courts from enforcing rights created by federal law"); *Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n*,

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For example, *see* Ohio Rev. Code Ann. §§ 4903.12 & 4903.13 (Baldwin 2000) (Supreme Court of Ohio has exclusive jurisdiction to review orders of Public Utilities Commission of Ohio); Kentucky Rev. Statutes, Ch. 278.410 (providing that Franklin Circuit Court is the exclusive forum for review of Kentucky Public Service Commission orders).

[11] The *Bell Atlantic* case decided by the Commonwealth Court and the *Bell Atlantic* case pending in the Third Circuit at No. 00-2620 are related. Both cases arise from the same Pennsylvania Commission order entered Sep. 30, 1999, and raise identical Federal law issues. Parties made both courts aware of the other case; no stay of the State court proceeding was requested. The Commonwealth Court was the first court to decide the issues. Accordingly, in the event that the Third Circuit rejects the commission's claim of sovereign immunity, the commission has asked the Third Circuit to give preclusive effect to the Commonwealth Court's judgment on the merits. *Brief for Appellants, Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, (3rd Cir., brief filed Dec. 11, 2000) (No. 00-2620).

544 Pa. 475, 677 A.2d 831, 832 (1996) (reviewing State commission determination for compliance with Federal law). In cases under section 252 of the Act, there is no firm basis to depart from these basic tenets of law.

II. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT A STATE COMMISSION WAIVES THE STATE'S SOVEREIGN IMMUNITY WHEN IT APPLIES THE SUBSTANTIVE PROVISIONS OF § 252 OF THE ACT TO REGULATED ENTITIES.

The constitutional principle of State sovereign immunity plays a vital role in our constitutional structure. *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 288 (4th Cir. 2001) (citing cases). The States' sovereignity, protected by the Eleventh Amendment,[12] precludes private suits against non-consenting States in Federal court. *Id.* However, nothing in the federal structure prohibits a State from voluntarily waiving its sovereign immunity from private party suit by explicitly consenting to such suit. *Id.* at 289. The test for determining whether a State has waived its immunity from Federal court jurisdiction is a stringent one. *Id.*; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *see also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675 (1999); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000). A Federal court may find a State to have waived its immunity only if the State directly and affirmatively waives its Eleventh Amendment immunity. *Bell Atlantic Maryland*, 240 F.3d at 289; *Atascadero*, 473 U.S. at 241.

A threshold question in this and similar cases is whether the State commission is authorized to waive a State's

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[12] U.S. CONST. amend XI.

immunity. In Pennsylvania, "only a command of the General Assembly is sufficient under Pennsylvania law to waive the Commonwealth's immunity." *Chittister v. Dep't of Commun. and Econ. Dev.*, 226 F.3d 223, 227 (3rd Cir. 2000). The Pennsylvania Commission lacks express authorization to waive immunity. 1 Pa.C.S. § 2310.[13] Waiver is authorized only in a handful of circumstances, not including administrative action pursuant to the Federal Telecommunications Act. 42 Pa. C.S. § 8522.[14] As this Court has recognized, absent express authorization, a State agency cannot waive a State's immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 103 n. 12 (1984). Therefore, Federal courts cannot assume a State commission has authority to waive a State's sovereign immunity merely because the State commission regulates the intrastate operations of telecommunications carriers.

The Seventh Circuit avoided the question of the Illinois Commission's authority. It held that a State itself waives immunity if it has not "taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress." *MCI Telcomm. Corp.*, 222 F.3d at 344 n. 10. In other words, the Seventh Circuit has held that

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[13] Pursuant to 1 Pa. C.S. § 2310, it is the intent of the General Assembly that the Commonwealth of Pennsylvania, and its officials and employees acting within the scope of their duties continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. Section 2310 further provides: "When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) or 62 (relating to procurement) unless otherwise specifically authorized by statute."

[14] 42 Pa. C.S. § 8522 sets forth specific exceptions to sovereign immunity and does not include actions under the Federal Telecommunications Act.

waiver can be found when a State does nothing. This is error. A "failure-to-forbid" standard is tantamount to revival of the discredited "constructive waiver" doctrine. "[T]he constructive-waiver experiment of *Parden [v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184 (1964)] was ill conceived, and [there is] no merit is attempting to salvage any remnant of it." *College Savings Bank*, 527 U.S. 666, 119 S.Ct. at 2228.

The recent case of *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Ok.*, ___ U.S. ___ (decided April 30, 2001) (2001 U.S. Lexis 3374) is instructive on what character of action is required to effect waiver. The Court issued a unanimous decision in *Citizens Band* on the question of whether immunity from private suit in a State court was waived with the requisite clarity by an Indian Tribe. After reviewing the facts, the Court held that the Tribe had waived its immunity with the requisite clarity.

In *Citizen Band*, the Tribe tendered a form construction contract to C&L Enterprises for construction of a roof. The Tribe inserted details not set forth in the form contract, including the selection of Oklahoma law to govern the contract. Applicable Oklahoma law provided for arbitration of contractual disputes with enforcement in any State court of competent jurisdiction. The Tribe signed the contract. After execution of the contract, but before C&L commenced performance, the Tribe retained another company to install the roof. C&L, claiming that the Tribe had dishonored the contract, submitted an arbitration demand. The Tribe asserted sovereign immunity and took the position that "no court, on earth or even on the moon" had jurisdiction over the contract.

The Court looked for and found actions taken by the Tribe to effect the waiver. The Tribe "proposed" or "tendered" a contract, "inserted" details not set forth in the form contract, "selected" Oklahoma law to govern the contract, and "signed" the contract accepted by C&L Enterprises. Each act was unambiguous and volitional. While the Tribe made

unambiguous, volitional acts to effect waiver, the same cannot be said of State commissions under the Act.

Another instructive case is *Petty v. Tennessee-Missiouri Bridge Commission*, 359 U.S. 275 (1959). In *Petty*, States acted in a similar unambiguous volitional fashion to effect waiver. States entered into a compact with an agreed-on suability provision, providing that the joint State commission could "be sued in its own name." The States submitted the compact to Congress for approval.[15] Accordingly, there was express waiver. Again, no such waiver has occurred here.

In the instant case, the Court must look for and analyze what, if any, unambiguous volitional acts form the basis of the alleged waiver of a State's immunity. Opponents contend that State commissions in Illinois, Pennsylvania and other States waive immunity by "accepting" an invitation, gift or gratuity from Congress. This acceptance manifests itself, the theory goes, when the commission issues an order resolving disputes between regulated companies or approving contracts presented by regulated companies. The Pennsylvania Commission submits that issuance of orders to regulated telecommunications carriers is an ordinary activity and does not express an intent to waive immunity.

At the very least, State commission issuance of orders pursuant to the mandate of the Act is ambiguous and lacks the requisite clarity to constitute waiver. Ambiguity exists because Congress did not offer, and State commissions did not receive, any compensation in return for issuance of orders. Congress did not ask for, and State commissions did not submit for approval, any proposed program for issuance of orders under the Act. In these regards, the Act is not analogous to the scheme of "federal cooperatism" approved in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*,

[15] *See* U.S. CONST. art. I, § 10 (prohibiting formation of an interstate compact absent Congressional approval).

452 U.S. 264, 271 (1981) (noting that Congress "provid[ed] for financial reimbursements to States" to encourage participation, and required the States to "submit a proposed permanent program to the [Federal Government]" for approval as a predicate for participation). Unlike *Hodel*, the Telecommunications Act provides for no financial reimbursements and requires neither program submission nor Federal approval to participate.

Moreover, in Pennsylvania, every measure of State commission authority contemplated by the Act is duplicative of a right and responsibility the Pennsylvania Commission already possessed under pre-existing Pennsylvania law.[16] For example, in 1993, the Pennsylvania General Assembly amended the Public Utility Code to add "Chapter 30," 66 Pa. C.S. §§ 3001-3009, thereby ending the old monopoly system for telecommunications carriers and expressing the legislative intent and the Pennsylvania Commission's obligation to introduce the benefits of competition into the local telecommunications markets throughout Pennsylvania.

[16] Under the laws of the Commonwealth of Pennsylvania, the Pennsylvania Commission is charged with the responsibility of regulating jurisdictional public utilities, including telecommunications carriers. 66 Pa. C.S. §§ 101-3316. The rights and responsibilities of the Pennsylvania Commission include the following: the general administrative power and authority to supervise and regulate all public utilities doing business in Pennsylvania, 66 Pa. C.S. § 501(b); the power to vary, reform and revise contracts entered into by a public utility that concern the public interest and general well-being of the Commonwealth of Pennsylvania, 66 Pa. C.S. § 508; the power to fix just and reasonable rates for the services provided by telecommunications utilities to customers, 66 Pa. C.S. § 1301; the power to require telecommunications utilities to provide adequate and reliable service to customers, 66 Pa. C.S. § 1501; and, the responsibility to implement the telecommunications policy of the Commonwealth of Pennsylvania as declared by the General Assembly. 66 Pa. C.S. § 3001 (West Supp. 1998) (declaration of policy).

The Act bestowed no new authority on the Pennsylvania Commission nor necessarily upon other State commissions. There is no indication that Congress intended to grant State commissions authority such commissions did not already possess under applicable State law. In fact, Congress itself defined State commissions by the authority granted in the respective States. 47 U.S.C. § 153(41) (characterizing a "State commission" as a commission constituted under the laws of a State). Even when advancing its litigation position, the Federal Government does not suggest that the Act provides State commissions with what would be truly new authority such as regulating inter-state operations or acting outside the geographical boundaries of their State. Thus, the issuance of State commission orders approving, rejecting, or enforcing contracts between jurisdictional carriers is an otherwise ordinary activity and does not constitute an express waiver of the State's immunity.

By regulating in a manner consistent with the substantive provisions of the Act, but asserting sovereign immunity and supporting State court review, the Pennsylvania Commission remains faithful to both the Pennsylvania Public Utility Code, the lawful provisions of the Act, and the Supremacy Clause of the United States Constitution.[17] In so acting, it has received neither "gift" nor "gratuity" from the Federal Government.

If the Act is not an invitation to accept the gift or gratuity of participating, then what is it? A fair reading reveals that the Act is a mandate. The Act provides that State commissions "shall approve or reject" interconnection agreements. 47 U.S.C. § 252(e)(1). It provides that State commissions "shall resolve" disputed issues between carriers. 47 U.S.C. § 252(b)(4)(C). These provisions are not conditional.[18]

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[17] U.S. CONST. art. VI (prohibiting a State commission from regulating in a manner that conflicts with Federal law).

[18] The Act was passed into law just prior to full implementation of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 48, *codified at* 2 U.S.C. §§ 1501-1571 (Supp. II 1996) (UMRA). It is the commission's understanding that the Act never underwent an UMRA analysis.

When viewed in the light of mandate, it is clear that Congress even contemplated a remedy for failure to act as required. Section 252(e)(5) authorizes the Federal Communications Commission to preempt State commission jurisdiction if the State commission "fails to act to carry out its responsibility." Thus, if the Pennsylvania Commission does not adhere to the Act, it risks sanction by FCC-preemption under § 252(e)(5) and the loss of ability to perform its pre-existing rights and responsibilities.

Although the Pennsylvania Commission cannot be forced to perform acts for Congress, *Printz v. U.S.*, 521 U.S. 898, 117 S.Ct. 2365, 2382 (1997), it can choose to voluntarily cooperate with Congress. This is what the Pennsylvania Commission and other State commissions have done. Such cooperation does not equate to agreement to be "deputized" as a Federal regulator subject to Federal court review. First, the Pennsylvania Commission has no express authority to waive the Commonwealth of Pennsylvania's immunity. Second, the Pennsylvania Commission, as a State administrative agency, cannot unilaterally agree to have its orders reviewed in Federal court to the exclusion of State courts. Moreover, Congress has no authority to pre-empt State laws providing for State court review of State administrative agency decisions.

A forced waiver of Pennsylvania's immunity from private party suit in Federal court, and an alleged disenfranchisement of the Pennsylvania Judiciary, one of the equal and independent branches of Pennsylvania Government, is not consistent with the law or our nation's scheme of federalism. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a

manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2263 (1999). Accordingly, State commissions do not waive a State's immunity or other applicable privileges of the sovereign when they apply the substantive provisions of Section 252 of the Act.

III. THE SEVENTH CIRCUIT ERRED IN ASSERTING JURISDICTION OVER THE INDIVIDUAL STATE COMMISSIONERS UNDER THE *EX PARTE YOUNG* DOCTRINE

The judicially created *Ex parte Young* doctrine is also subject to a State's rights as a sovereign. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). A State's rights are violated if individual commissioners are subject to Federal court jurisdiction in the circumstances of this case, namely circumstances where private parties seek ordinary appellate-style review of a State commission decision, especially where any aggrieved party has a right to immediate State court review.[19] Cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-71 (1963) (relying on doctrine of *Ex parte Young* to restrain morality commission where commission's decisions bore a heavy presumption against constitutional validity and where commission did not operate "under judicial superintendence.") The Court should reject the Seventh Circuit's holding that jurisdiction is proper under the doctrine of *Ex parte Young*.

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[19] Essentially, the *Ex parte Young* doctrine is a form of equitable relief. It is well established that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). In the instant case, the party complaining about the State commission action has an adequate remedy at law—State court review. There is no apparent irreparable injury at play. Therefore, an equitable remedy need not be applied.

The doctrine does not apply because the State commission is the real party in interest, consistent with both Federal and State law.[20] It is the State commission, not individual commissioners, which defends the commission's order on judicial review.[21] Indeed, the complainant may not have been "aggrieved" by all commissioners depending on how the individual commissioner voted. "The Eleventh Amendment bars a suit against State officials when 'the state is the real party in interest.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). *See* U.S. Const. amend. XI. "When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Coeur d'Alene Tribe*, 521 U.S. at 269. The general rule is that a suit brought against State officials is a suit against the sovereign if the judgment sought would interfere with the public administration or restrain the State Government from acting. *Pennhurst*, 465 U.S. at 101 n.11.

The plain language of Part II of the Act[22] reveals Congressional recognition and preservation of State interests. *See*, for example, 47 U.S.C. § 252(e)(3) (preserving a State commission's authority to establish and enforce requirements

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[20] Federal courts have held State agencies to be the only proper party in an action challenging that agency's order. *See, e.g., Ricci v. State Bd. of Law Examiners*, 569 F.2d 782, 784 (3d Cir. 1978) (Pennsylvania Supreme Court was indispensable party in proceeding to invalidate its rules); *Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp.*, 837 F. Supp. 769, 770 (M.D. La. 1993) (collateral attack on agency's order made agency an indispensable party).

[21] In Pennsylvania, individual commissioners have no authority to bind the commission, except in public emergency situations not relevant to this case. A majority vote of the commissioners at public meeting is required for official Pennsylvania commission action.

[22] Development of Competitive Markets, 47 U.S.C. §§ 251-261 (West 2000).

of State law in its review of an interconnection agreement), §§ 253(b)-(c) (preserving State authority to, *inter alia*, impose requirements necessary to protect the public safety and welfare and to manage public rights-of-way), § 254(f) (preserving State authority to advance universal service in that State), and §§ 261(b)-(c) (preserving generally existing State regulations and additional state requirements that are not inconsistent with the Act). *See also* 47 U.S.C. § 271(d)(2)(B) (requiring FCC consultation with State commission on special provisions concerning Bell Operating Companies). Moreover, the establishment of rates is a matter particularly reserved for States. *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 384 (1999). A State commission's interest goes beyond a utility's narrow business interest to the broad public interest. Indeed, this Court has recognized that the regulation of utilities "is one of the most important of the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 365 (1989).

Here, the Seventh Circuit has interfered with the Illinois Commission's regulation of local telecommunications markets, thus, interfering with public administration or restraining the State Government from acting. A claim of error in the official's exercise of delegated power is an insufficient basis for the suit to be allowed as an exception from the constitutional doctrine of sovereign immunity. *See Pennhurst*, 465 U.S. 89. The Seventh Circuit seeks to extend *Ex parte Young* to provide a substitute for ordinary judicial review of agency decisions Congress "invited," if not directed, the State commission to make. This extension of *Ex parte Young* should be rejected by this Court.

CONCLUSION

Section 252(e)(6) of the Act grants jurisdiction to Federal district courts to review certain actions taken by a State commission. *Amicus Curiae* Pennsylvania Commission takes no position on whether it was lawful for Congress to confer such jurisdiction on Federal district courts. Assuming the grant of jurisdiction was lawful, the Pennsylvania Commission submits that Federal courts cannot assert their jurisdiction to review a State commission's actions under § 252 of the Act absent party participation by the State commission and concomitant voluntary waiver of the State's sovereign immunity. Mere action to approve, reject, or enforce contracts between telecommunication carriers is insufficient to constitute the requisite voluntary, unequivocal waiver of the State's sovereign immunity from private party suit in Federal court. In this case, the requisite waiver is lacking. The subject private suit is also not authorized by the doctrine of *Ex parte Young*.

The challenge of this case is to balance the legitimate Congressional policy goals with the legitimate sovereign interest of States. The Pennsylvania Commission submits that the proper balance is to hold that a State commission like the Pennsylvania Commission is free to act in cooperation with the Federal government to implement the substantive pro-competitive provisions of the Act without necessarily simultaneously waiving a State's sovereign immunity. An important element in this position is the availability of State court review for all decisions of the State commission consistent with State judicial review provisions guaranteed by State constitution or statute.

Accordingly, the Court should grant the Writ of Certiorari and reverse the Seventh Circuit's jurisdictional holdings.

Respectfully submitted,

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Supreme Court of the United States

RICHARD L. MATHIAS, et al.

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., et al.

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the 7th Circuit

BRIEF OF THE STATES OF NEW JERSEY, ALABAMA, ALASKA, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, MASSACHUSETTS, MICHIGAN, NORTH CAROLINA, OHIO, SOUTH DAKOTA, UTAH, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Local telephone service has traditionally been regulated by state public utility commissions. Although advances in technology have led Congress to assume a larger role in regulating local phone service, it recognized in the Telecommunications Act that this is an area in which both interstate and intrastate commerce are inextricably linked. The Act thus sets out an allocation of responsibilities between the states and the Federal Communications Commission ("F.C.C.") that seeks to balance both state and federal interests. The *amici* states have a significant interest in seeing that this allocation is properly construed so as to preserve each state's ability to protect its citizens. *Amici* also have an interest in ensuring that the Act is construed to respect state sovereignty.

SUMMARY OF ARGUMENT

Over the last twenty years, telephone service has been transformed from what was perceived to be a "natural monopoly" to an industry in which competition is encouraged. Throughout this period of deregulation, Congress, the F.C.C. and State public utility commissions have worked to maintain a balance between state and federal oversight, with a goal of encouraging competition while preserving access to this essential public service.

The Telecommunications Act of 1996 Act reflects this balance. Although the Act provides for federal regulation in areas that had previously been regulated exclusively by the states, it expressly preserves state jurisdiction over certain areas of local concern. Though the result may be novel, the Act's structure and language reflect an effort to reconcile both federal and state interests. Any construction of the statute must therefore be particularly loyal to its terms. Through

construction and implication, the court below expanded federal jurisdiction over state commission decisions. This extension is not provided for in the language of the statute and is inconsistent with the blended state/federal jurisdiction established by Congress in the Act. State commission decisions relating to the enforcement and subsequent interpretation of interconnection agreements should be reviewed pursuant to that state's normal procedures for appealing final agency action. This result, as opposed to the decision below, is consistent with the Act's language and overall structure.

The court below also interpreted the Telecommunications Act to provide a constructive waiver of Eleventh Amendment immunity for the state commissioners exercising implied powers under the Act. Constructive waivers of this sort are no longer permitted under this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). The authority of the state commission to enforce and interpret interconnection agreements, and federal court jurisdiction over that authority are not even expressly discussed in the Act. There is thus no clear and unmistakable intent expressed by Congress that exercising this authority constitutes a waiver of immunity. Nor is there any clear indication by the state commission that by exercising its authority under the Act it intended to knowingly and voluntarily relinquish its immunity. The Court's ruling below is therefore inconsistent with this Court's requirements for establishing waiver. See, *College Savings Bank, supra*, 527 U.S. 666; *Edelman v. Jordan,* 415 U.S. 651 (1974).

Even if the purported waiver in this case had been more explicit, conditioning regulatory jurisdiction on a waiver of immunity under these circumstances is improper. Far from constituting a "gift" or "gratuity," the condition is coercive,

requiring a state to choose between its constitutional rights and traditional aspects of state regulation that have been preserved by Congress in the Act.

Finally, this is not a situation where applying the exception to the Eleventh Amendment set forth in *Ex Parte Young,* 209 U.S. 123 (1908) is necessary to vindicate federal rights or ensure the primacy of federal law. In fact, a prospective injunction against the individual members of the state commission will not redress the injury claimed by respondents. No individual commissioner can unilaterally bind the commission, and the record reflects no imminent enforcement planned by any commissioner against respondents to enforce the interconnection agreement. This is not a situation where federal court intervention is necessary to ensure compliance with federal law. It is a fairly basic appeal of administrative agency action -- action that was based primarily on contract interpretation and matters of both state and federal law. The *Ex Parte Young* exception, therefore, does not apply.

ARGUMENT

I. FEDERAL COURT REVIEW OF STATE COMMISSION DECISIONS ENFORCING OR INTERPRETING APPROVED INTERCONNECTION AGREEMENTS IS CONTRARY TO THE LANGUAGE, STRUCTURE AND PURPOSE OF THE TELECOMMUNICATIONS ACT.

The Telecommunications Act does not specifically address how disputes regarding approved interconnection agreements between local telephone service providers will be resolved. The Courts of Appeals have generally found that the authority of state commissions to approve agreements implies authority to interpret and enforce them. Many of these Courts have also extended the jurisdictional provision in 47 U.S.C. §252(e)(6) to these decisions, even though the federal court's jurisdiction under that section is limited to decisions approving or rejecting agreements. This extension is inconsistent with the language, purpose and structure of the Act. Accordingly, if the federal jurisdictional provision is to survive, it must be limited to the express terms enacted by Congress.*

1. To ease the entry of new companies into the local telephone market, the Telecommunications Act of 1996 provides for the incumbent local phone company to negotiate agreements with potential competitors. 47 U.S.C. §252(a). Through these agreements, the companies arrange payments to each other for the use of their overlapping services. See, 47 U.S.C. §251. If the parties cannot agree to terms, the Act

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* The constitutionality of federal court review of decisions to approve or reject agreements is not at issue in this case. The states reserve the right to contest its validity.

provides procedures by which the agreements may be mediated or arbitrated by the state utility commission. 47 U.S.C. §252(a)(2), (b)(1). Whether negotiated, mediated or arbitrated, the parties must seek the approval of the state commission. 47 U.S.C. §252 (e). If a state commission fails to act on a request for approval, the agreement is deemed approved. 47 U.S.C. §252(e)(4).

Pursuant to 47 U.S.C. §252(e)(5), the F.C.C. may preempt a state commission's jurisdiction when the commission "fails to carry out its responsibility" under that section. Because non-action on a request for approval of an agreement results in the agreement being deemed approved, this section has been interpreted by the F.C.C. as applying to situations where the state commission fails to respond, within a reasonable period of time, to a request for mediation or arbitration, or fails to complete an arbitration within the time limits set forth in the statute. 47 C.F.R. 51.801.*

In this case, the challenged action did not involve the approval or rejection of an interconnection agreement. It also did not involve an action relating to the institution or completion of an arbitration or mediation. The action here relates to a petition filed with the state commission to resolve a disagreement between the parties as to the meaning of an already approved agreement.

There is no express provision in the Act providing for the state commissions to enforce or otherwise resolve disputes

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* Section 253(d) also permits the F.C.C. to preempt the enforcement of a state or local requirement if it violates 47 U.S.C. §253(a) or (b), prohibiting state requirements that interfere with a company's provision of service or that interfere with the universal service requirements of §254.

between the parties to a previously approved agreement. That power has been inferred by the federal courts and the F.C.C. from other provisions of the statute. In *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part, sub nom, *A.T. & T. Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Eighth Circuit held:

> We ... believe that state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act to be submitted for state commission approval.... We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved. [*Id.* at 804].*

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* In a footnote, the Court indicated its belief that review of such decisions would be in the District Court pursuant to §252(e)(6). *Id.* Since *Iowa Utilities Board*, there has been a split in the circuits regarding not only the jurisdiction of the federal courts to review enforcement decisions by state commissions, but the scope of any such review. Compare, *Bell South Telecommunications, Inc. v. North Carolina Utilities Commission*, 240 F.3d 270 (4th Cir. 2001); *Bell Atlantic Maryland v. MCI Worldcom*, 240 F.3d 279 (4th Cir. 2001) (state commission decisions interpreting interconnection agreements not reviewable in federal court under §252(e)(6)); *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Okla.*, 235 F.3d 493 (10th Cir. 2000) (state commission decisions interpreting interconnection agreements reviewed by District Court *de novo* as to both state and federal law); and *Southwestern Bell Telephone Co. v. Connect Communications*, 225 F.3d 942 (8th Cir. 2000) (state commission decision interpreting interconnection agreements reviewed by District Court to determine compliance only with federal law).

The Act does specify federal court jurisdiction over certain decisions of the state commissions under the Act. Section 252(e)(6) provides:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

By its terms, the above provision establishes jurisdiction in the federal court only for "determinations" made by the state commission "under this section." Under the plain language of the statute, this would include decisions to approve agreements - either by failing to act or issuing orders of approval, and decisions to reject or modify agreements.* It does not by its terms apply to any other determinations that may be made by the state commissions under the Act. Nor does it expressly apply to the state commission's inferred authority to enforce or interpret agreements.

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* It is not specified in the statute whether decisions made in the course of arbitrations or mediations would be subject to this provision. However, because all agreements, whether negotiated or arbitrated must ultimately be approved by the state commissions, decisions made prior to the ultimate approval or rejection would not be final agency action subject to review. See, *Bennett v. Spear*, 520 U.S. 154 (1997).

2. The extension of federal jurisdiction to decisions other than those approving or rejecting agreements is not only beyond the plain language of the statute, it is inconsistent with the Act's overall structure and purpose. As the Court of Appeals for the First Circuit stated,

> the general policy expressed in the statute [recognizes] state authority over certain aspects of local telecommunications -- in areas over which the states held virtually exclusive sway prior to the enactment of the Act -- while ensuring compliance with federal law. The Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations. *[Puerto Rico Telephone Co. v. Telecommunications Regulatory Board of Puerto Rico,* 189 F.3d 1, 14 (1st Cir. 1999) (quoting *AT&T, supra,* 525 U.S. 366, n.6)].

Consistent with this shared federal/state responsibility, §252 specifically provides that, subject to the limitations on barriers to local markets provided in §253 of the Act, "nothing in this section shall prohibit a state commission from establishing or enforcing other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. §252(e)(3). Similarly, §253 of the Act, while prohibiting states from creating barriers to local markets, also preserves certain aspects of state jurisdiction. Subsection (b) provides that nothing in that section "shall affect the ability of a state to impose, on a competitively neutral basis,... requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure

the continued quality of telecommunications services, and safeguard the rights of consumers."* Section 253 also provides that the states retain authority to manage public rights-of-way, and require fair and non-discriminatory compensation for the use of rights-of-way.

The limitation provided in §252(e)(6) on the district court's jurisdiction reflects this residuum of state regulation. A district court's review of a state commission's approval or rejection of an agreement is limited to whether the agreement meets the requirements of sections 251 and 252. It does not by its terms cover other aspects of a state commission's decision, such as consistency with state law, or matters addressed in §253. See, *Puerto Rico Telephone Company, supra*, 189 F.3d 1. It is a very limited jurisdictional provision designed to permit federal courts to review final agreements solely to determine their consistency with federal law.**

After ensuring that the agreement is consistent with federal law, the federal court's oversight of the state commissions on this issue is over. If a petition is filed seeking an interpretation of an approved agreement, all the state commission is doing is attempting to give effect to the original agreement which was already subject to review by the federal court for consistency

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* Any such requirements must be consistent with 47 U.S.C. §254, which provides for a Federal-State Joint Board to establish universal service requirements relating to, inter alia, quality of service, rates, access to advanced services, and access in rural and high cost areas .

** Unlike some of the circuits that have addressed this issue, see, *e.g., Southwestern Bell Telephone, supra*, 225 F.3d 942, the Court below did limit its review to questions of federal law. A contrary ruling would be unconstitutional, as the federal court lacks power to "instruct state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984).

with the Act. This is a determination the state commissions are clearly equipped to make, as the determination of whether calls are local or long distance has traditionally been "determined exclusively" by state regulatory bodies. *U.S. v. Western Electric Co. v. A.T. & T.*, 569 F.Supp. 990, 994 (D.D.C. 1983). The state courts are more than capable of reviewing administrative agency action and the contractual issues that are likely to occur in these cases. They are also perfectly capable of ensuring compliance with federal law. *Testa v. Katt*, 330 U.S. 386 (1947). Indeed, state court review is more efficient, as the state courts would have jurisdiction over the entire matter, including questions of state law. *Pennhurst v. Halderman, supra*, 465 U.S. at 117.

3. Limiting §252(e) to its terms is also necessary to avoid constitutional doubt. See, *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237 (1998) (Courts should avoid constructions of a statute that would render it unconstitutional). In *Printz v. United States*, 521 U.S. 898 (1997), the Court reiterated that under the Tenth Amendment, "The Federal Government may not compel the states to enact or administer a federal regulatory program." *Id.* at 925 (quoting *New York v. U.S.*, 505 U.S. 144 (1992)). Although the Court has upheld some "cooperative federalism" programs against Tenth Amendment challenges, see, *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), the statutory scheme here does not merely provide for a delegation of federal authority to the states in an otherwise preempted field. *Hodel, supra*, 452 U.S. at 288. Rather, it contemplates shared federal/state regulation of local telephone service, with only some aspects preempted by the federal government. Unlike *FERC,* this is also not simply a situation where the states are being asked to include federal considerations in their oversight. They are being sued individually in federal court for an order compelling them to

exercise their jurisdiction in a particular manner. This statute therefore differs in significant ways from the Tenth Amendment cases cited by the Court in *Printz*, thus raising constitutional questions that should be avoided by construing the statute consistent with its express terms.

Limiting §252 to its terms would, as to the enforcement and interpretation of interconnection agreements, also prevent constitutional doubt with respect to the Eleventh Amendment. As discussed in Point II, below, if §252 is interpreted to provide state commission oversight of the enforcement and interpretation of agreements, and the jurisdictional provision in §252(e)(6) is interpreted to extend to such oversight, the provision would constitute an implied abrogation by Congress of the states' Eleventh Amendment immunity under its Commerce Clause authority, in contravention of this Court's decision in *Seminole Tribe of Florida v. Florida*, 516 U.S. 1044 (1996).*

In sum, if the jurisdictional provision of 47 U.S.C. §252(e)(6) is to survive at all, it must be limited to its express terms. By those terms, federal court review is solely of approvals or rejections of interconnection agreements and then only to determine consistency with federal law. While greater authority for the state commissions, such as the interpretation or enforcement of already approved agreements, may be implied, federal jurisdiction to review the states' exercise of

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* As noted by the Fourth Circuit in *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 308 (2001), *cert. pending*, Dkt. No. 00-1531, implied federal court authority to review the final decisions of the state commissions is also inconsistent with the well-established jurisdictional limitation on the federal courts set forth in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

those implied powers may not. The review of such decisions must proceed through the state courts as appeals of final agency action, with ultimate federal recourse to this Court.

II. THERE HAS BEEN NO KNOWING OR VOLUNTARY WAIVER OF ELEVENTH AMENDMENT IMMUNITY BY THE STATE COMMISSIONS. CONDITIONING THE RETENTION OF TRADITIONAL REGULATORY AUTHORITY OVER LOCAL TELEPHONE SERVICE ON A WAIVER OF IMMUNITY IS AN IMPERMISSIBLE AND COERCIVE SANCTION.

The Eleventh Amendment to the Constitution provides sovereign immunity to the states absent consent or abrogation consistent with the "constitutional design." *Alden v. Maine*, 527 U.S. 706 (1999). A state may consent to suit, but its actions must demonstrate a knowing and voluntary intention to relinquish its constitutional right. *College Savings Bank, supra,* 527 U.S. at 675. Statutes that rely on "cooperative federalism," involving shared federal/state regulation and/or funding, test the boundaries of knowing and voluntary waiver. In this case, the Court below stretched those boundaries too far, turning the doctrine of waiver into a means to achieve abrogation in a statute based on Article I powers. The decision below is contrary to this Court's recent cases regarding waiver and abrogation and is inconsistent with the constitutional design.

As noted, the Telecommunications Act preserves for the states the regulation of certain traditional areas of local concern. The Court below held that a jurisdictional provision in the statute demonstrates clear intent by Congress to condition a state's acceptance of these aspects of its traditional

authority on a waiver of immunity. Although the states' authority to enforce and interpret previously approved interconnection agreements is not express, but was inferred from the overall purpose and structure of the Act by the federal courts, the Court below held that the states had knowingly and voluntarily waived their immunity by exercising this regulatory "gift."

The Court's decision is incorrect for two reasons. First, the statutory provisions at issue here are not sufficiently unambiguous to result in a knowing and voluntary waiver by the states. They do not establish waiver as a condition "by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction." *Edelman v. Jordan, supra*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151(1909)). Second, although this Court has suggested that Congress may have the authority under the Spending Clause to expressly condition the receipt of federal funds on a waiver of immunity, this reasoning should not apply to delegations of regulatory authority under the Commerce Clause. When what is attached to the refusal to waive is forcing a state to relinquish its power to protect the public interest, "the point of coercion is automatically passed -- and the voluntariness of waiver destroyed...." *College Savings Bank, supra,* 527 U.S. at 687. The statutory provisions here are thus insufficient to effectuate a waiver of immunity.

1. The Court below erred in finding the language of the statute sufficiently unambiguous to result in a knowing and voluntary waiver by the states. As the Court stated in *Edelman v. Jordan, supra*, 415 U.S. at 673, "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." This Court has therefore held that if Congress intends to impose a condition on the acceptance of

federal funds, it must do so unambiguously. In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), the Court stated: "[b]y insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation."

Thus, in the cases where the issue has been raised, the Court has applied a stringent test to determine if the statutory language was sufficient to result in a knowing and voluntary waiver of immunity. In each case, the Court found that the statute was not sufficiently unambiguous to result in a waiver. See, *Edelman v. Jordan, supra*, 415 U.S. at 674 (participation in a federal funding program was not sufficient, when the only sanction in the statute against a state that did not comply with the federal requirements was withdrawal of federal funding); *College Savings Bank , supra,* 527 U.S. at 680 (participation in an interstate activity was insufficient to constitute a constructive waiver of immunity, specifically overruling *Parden v. Terminal R. of Ala.*, 377 U.S. 184 (1964)). In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court examined the former text of the Rehabilitation Act providing "[a] general authorization for suit in federal court." The Court ruled that a general jurisdictional provision "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment," and that it "likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a state's consent to waive its constitutional immunity." *Id.* at 246. Here too, the statute says nothing about Eleventh Amendment immunity but merely provides a general authorization for suit in federal court. Just as this language was found insufficient in *Atascadero*, it is insufficient to demonstrate unambiguously Congress' intent to condition continued state regulation as set forth in the Telecommunications Act, on a waiver of immunity.

There is also nothing here to demonstrate that the states, by exercising authority to enforce and interpret interconnection agreements, understood and accepted that such action would constitute a "knowing and voluntary" waiver of immunity. In *College Savings Bank*, 527 U.S. at 680, the Court explained:

> The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress' expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity.

Accord, *Edelman v. Jordan, supra*, 415 U.S. at 673 ("[t]he mere fact that a state participates in a program through which the Federal Government provides assistance for the operation by the state of a system of public aid is not sufficient to establish consent on the part of the state to be sued in the federal courts.").

Indeed, if Congressional language was sufficient to overcome immunity without any clear manifestation by the state that it intended to waive its constitutional rights, then the concept of waiver will have become nothing more than another means to achieve abrogation. As the Court stated in *College Savings Bank*,

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would ... as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin - they are the same side of the same coin. [527 U.S. at 683.]

Here, there has been neither a clear declaration by Congress of an intent to condition jurisdiction on a waiver of immunity nor a clear declaration by the state commission that it knowingly and voluntarily waived its immunity. The Court below found evidence of Congressional intent to condition regulatory jurisdiction on a waiver of immunity in the title of §252(e)(6). The Court stated "subsection 252(e)(6) provides for judicial review of 'state commission action,' not simply review of 'interconnection agreements'." *Id.* (quoting *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315, 320, amended by 183 F.3d 558 (7th Cir. 1999), after rehearing, 222 F.3d 323 (7th Cir. 2000). In addition, the court relied on the finding in *MCI* that "[a]lthough the language of the statute does not contain the express waiver language that the commissions seek, the structure of the pertinent section of the statute, notably 47 U.S.C. §252 ... nevertheless makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section...." 222 F.3d at 341.

This interpretation of the statutory language ignores this Court's repeated insistence on unmistakable clarity regarding an intent by Congress to require waiver of Eleventh Amendment immunity. First, as noted in Point I, above, state commission interpretation and enforcement of interconnection agreements is not even expressly provided for in the statute. That authority,

as well as the application of the jurisdictional provision in §252(e)(6), was "inferred" from the statute by the federal courts. Second, the Court below mischaracterizes the statutory language that is there. Although the title of §252(e)(6) is "Review of State commission actions," the language of that section specifically states that the federal court's review is limited to "whether *the agreement or statement* meets the requirements of section 251 of this title and this section." (emphasis added).* See, *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589, 594 (1934) (title of act only to be resorted to as aid to statutory construction if language of act itself is ambiguous). Thus, the statute contemplates that the review will be of the agreement and does not manifest with any clarity that it was aimed at the state commissions or was intended to require a waiver of Eleventh Amendment immunity.

Moreover, in finding a constructive waiver, the Court below relied on its prior decision in *MCI*, *supra*, 222 F.3d at 339-40, that, despite this Court's ruling in *College Savings Bank*, waivers of Eleventh Amendment immunity could still be implied. 179 F.3d at 569. The *MCI* court found that *College Savings Bank* only abandoned *"Parden*-style" constructive waivers, *i.e.*, waivers implied from participation in interstate activities regulated by Congress under the Commerce Clause. *Id.* (referring to *Parden v. Terminal Railway of the Ala. Docks Dept.*, *supra*, 377 U.S. 184 (1964)). The *MCI* court found that *College Savings Bank* did not preclude other types of constructive waivers, but rather "set boundaries" for Congressional attempts to impliedly waive a state's immunity.

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* The use of the term "statement" is a reference to §252(f) which permits an incumbent carrier to file a statement of the terms and conditions it generally provides in the state to comply with the requirements of §251. This statement must also be approved by the state commission. 47 U.S.C. §252(f)(2).

Id. However, by parsing the words of this Court's decision in *College Savings Bank,* the Court below lost sight of the decision's overall meaning. Constructive waivers, *i.e.*, those that are not express conditions within the statute but are implied by the federal courts, do not survive College Savings Bank. That decision could not have stated any more clearly that for a waiver of Eleventh Amendment immunity to be effective, there must be a "clear declaration" by the state to accept Congress' unambiguous offer. 527 U.S. at 680. No such declaration has been made or found here.

2. Even if the language of the statute was sufficiently clear to establish Congressional intent to condition state involvement in local telephone regulation on a waiver of immunity, the condition would be invalid. Congress was not acting here pursuant to its Spending Power and its allocation of federal and state responsibilities in the Telecommunications Act was not a "gift" that could be conditioned on a waiver of constitutional rights. As in *College Savings Bank,* it would be an impermissible and coercive sanction, excluding the state commissions from "otherwise permissible activity" if they decline to waive their immunity.

The concept of allowing Congress to condition the receipt of federal funds on a waiver of Eleventh Amendment immunity grows out of a line of cases that upheld similar statutes imposing other conditions on receipt of federal funds. See, *e.g. South Dakota v. Dole*, 483 U.S. 203 (1987) (conditioning federal highway funds on a state's agreement to raise its drinking age to 21); *Lau v. Nichols*, 414 U.S. 563 (1974) (conditioning federal financial assistance to schools on a state's agreement not to discriminate on the basis of race); See also, *Kansas v. U.S.*, 214 F.3d 1196, cert denied --U.S.--, 121 S.Ct. 623 (10th Cir. 2000) (listing cases upholding funding conditions). As this Court stated in *Pennhurst v. Halderman*,

supra, 451 U.S. at 17, "Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions."

Although *amici* could find no case where this Court has found valid a waiver of Eleventh Amendment rights as a Spending Clause condition, the Court has left open that possibility. *College Savings Bank, supra,* 527 U.S. at 686. In *College Savings Bank*, however, the Spending Clause was not at issue, because "what Congress threatens if the state refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the state from otherwise permissible activity." *Id.*

Here too, the issue is not Congress' power under the Spending Clause. What Congress threatens if the state refuses to agree to its condition is not the denial of a gift but the withdrawal of its right to retain a significant piece of its traditional jurisdiction over local telephone service. What the statute threatens if the waiver condition is not met, is the elimination of a state's power to protect its citizens in certain traditional areas of local concern. In this respect, *College Savings Bank* is directly on point. In *College Savings Bank,* the sanction was exclusion from participation in an interstate commercial activity. Here, the sanction is exclusion from aspects of local telephone regulation which are reserved for the states in the Act and which involve matters of state law and concern. The Court below's ruling thus leads to bizarre results: If the State of Illinois had decided to *become* a local telephone service provider, it would retain its Eleventh Amendment immunity under *College Savings Bank.* If it adjudicates disagreements between companies regarding interconnection agreements -- a distinctly sovereign function -- its immunity is deemed constructively waived.

The fact is that in this case, as in *College Savings Bank*, "where the constitutionally guaranteed protection of the states' sovereign immunity is involved, the point of coercion is automatically passed--and the voluntariness of waiver destroyed" when what is attached to the refusal to waive is exclusion of the state from exercising its sovereign powers to protect the public interest. The powers here have traditionally been exercised by the states and have been reserved to the states by Congress in the Act. They are not "gifts," but indications of Congress' recognition of the history and importance of state regulation of local telephone service.

The Court below's reliance on cases upholding, under the Tenth Amendment, delegation of regulatory jurisdiction in an otherwise preempted field, is similarly invalid. *Id.* at 342. In *Printz v. United States*, *supra*, 521 U.S. 898, the Court noted that "cooperative federalism" programs allowing for continued state involvement in an otherwise preempted field did not violate the Tenth Amendment, citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*, 452 U.S. 264, and *FERC v. Mississippi*, *supra*, 456 U.S. 742. The Court below viewed such state involvement as a "gratuity," comparable to offers of federal funds under the Spending Clause.

However, the statutory scheme here is not comparable to those in *Hodel* and *FERC*. In upholding the Surface Mining Act in *Hodel*, the Court relied on the fact that "[t]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program ...the full regulatory program will be borne by the Federal Government." 452 U.S. at 288. In the Telecommunications Act, however, the preemption provisions only permit the F.C.C. to take over in certain circumstances, *i.e.*, if a state commission fails to

institute or complete an arbitration or mediation, 47 C.F.R. 51.801, or if a state or local requirement conflicts with 47 U.S.C. §253(a) or (b).* If a state commission fails to act on a request for approval, the agreement is deemed approved. 47 U.S.C. §252(e)(4). If a state fails to act on a petition to interpret or enforce an approved agreement, the Act does not provide any remedy, as that power is not expressly contemplated in the statute. Unlike *Hodel*, therefore, state commission regulation in this area is not simply a federal benefit the states may choose to accept, it is an integral part of the federal/state allocation of jurisdiction under the Act.

Similarly, in *FERC v. Mississippi*, *supra*, 456 U.S. at 769, the Court rejected a Tenth Amendment challenge to the Public Utility Regulatory Policies Act. Although that statute did not include alternative federal regulation like the statute in *Hodel*, the Court found that the statute did not coerce a state to enforce a federal program because, as long as certain minimum federal standards were met, the Act allowed them to "enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* at 767 (quoting *Hodel*, 452 U.S. at 289). The Court also found that the review provisions of the Act were not unconstitutionally coercive because the state was asked only to adjudicate disputes arising under the statute, and "make its administrative tribunals available for the vindication of federal as well as state-created rights." *Id.* at 769.

In this case, however, the statutory scheme arises in an area of traditional state regulation and contemplates shared federal and state power, rather than a delegation of preempted

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* Moreover, §601 of the Act, Pub. L 104-104, §601 (codified at 47 U.S.C. §152, note), provides that the 1996 revisions to the Act "shall not be construed to modify, impair or supersede" state law unless "expressly" provided in the Act.

authority. This is not simply a situation where a state can decide not to participate, knowing that federal regulation will inevitably result. It is unclear what the result will be if a state commission declines to review disputes over interconnection agreements.* A decision to act, according to the Court below, subjects the state commissioners to suit in federal court. This is not a "gift" bestowed by Congress, that implies a voluntary waiver of constitutional immunity. It is a coercive sanction imposed in violation of the Eleventh Amendment.

In sum, *amici* States have not found a single case where this Court has upheld a statute that conditions state regulatory jurisdiction upon a waiver of Eleventh Amendment immunity, much less regulatory jurisdiction that had been exercised by the states until the last five years. The overlapping federal/state jurisdiction in the Telecommunications Act is not a "gift" bestowed by Congress on the states. It is a recognition by Congress that the statute addresses both interstate and intrastate

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* For example, Virginia's commission has issued orders in certain cases declining to decide disputes regarding already approved agreements. In one case, citing "unique circumstances," the F.C.C. extended its preemptive power to an enforcement decision, even though it acknowledged that its regulations allow for §252(e)(5) preemption only when a state fails to respond to a request for mediation or arbitration or complete a mediation or arbitration on a timely basis. *In the Matter of Starpower Communications*, 15 FCC Rcd. 11,277 (2000). In that case, the F.C.C. also upheld the company's pursuit of a simultaneous appeal in the district court as a mere exercise of "its right to seek alternative remedies." *Id.* In another case, the F.C.C. stated that the proper remedy for a state's determination not to decide enforcement disputes was to seek F.C.C. preemption rather than district court review. *In the Matter of Cox Virginia Telecom, Inc.*, 15 FCC Rcd. 17, 958 (2000). The Fourth Circuit, meanwhile, of which Virginia is a part, has ruled that federal review of enforcement decisions is barred by the Eleventh Amendment. *Bell Atlantic Maryland, supra*, 240 F.3d 279. This jurisdictional maze does not lead to any certainty as to what the result will be if a state commission declines this purported "gift."

matters, and that certain local concerns may be better addressed through the participation of the state commissions. Requiring waiver of constitutional rights in exchange for the state's traditional regulatory jurisdiction is inherently coercive and offensive to state sovereignty.

There is also no clearly expressed intention in the statute that unmistakably conditions the exercise of regulatory authority over local telephone service on a waiver of immunity. Nor do the state's actions clearly manifest a knowing and voluntary waiver of immunity. If the doctrine of constructive waiver is no longer valid when a state participates in "lawful activity" affecting interstate commerce, it is also no longer valid when a state exercises responsibilities preserved for it by Congress in a statute. This Court has never extended the principle of *South Dakota v. Dole* this far, and it should not do so here.

III. *EX PARTE YOUNG* PROVIDES A FEDERAL REMEDY WHERE NECESSARY TO VINDICATE FEDERAL RIGHTS AND THE SUPREMACY CLAUSE. IT DOES NOT PROVIDE A FEDERAL FORUM FOR REVIEW OF STATE ADMINISTRATIVE AGENCY ACTION.

Another recognized exception to Eleventh Amendment immunity is the doctrine established in *Ex Parte Young*, 209 U.S. 123 (1908). Under *Ex Parte Young* state officials can be sued individually for prospective relief to enjoin continuing violations of federal law. *Edelman v. Jordan, supra*, 415 U.S. 651. The purpose of the exception is to ensure that a remedy exists to stop continuing violations of federal law, thus "giv[ing] life to the Supremacy Clause." *Green v. Mansour*,

474 U.S. 64, 68 (1986). However, this Court has recently affirmed that *Young* does not authorize suits against state officials in every action merely because prospective injunctive relief is sought. *Idaho et al. v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261(1997). Instead, "[a]pplication of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Id.* at 270. Permitting a federal action against the state commissioners here is not necessary to vindicate federal rights or ensure the supremacy of federal law. What is sought is not a prospective injunction against ongoing violations of federal law, but a review of state administrative agency action. The *Ex Parte Young* exception is therefore inapplicable.

Applying the exception to Eleventh Amendment immunity set forth in *Ex Parte Young* to the actions of the state officials in this case is not consistent with the purpose of the exception. The state officials here are not alleged to have violated any constitutional provision. They are not alleged to have exceeded the scope of their authority under the Act or to have failed to perform a mandatory duty. They simply interpreted the substantive provisions of an interconnection agreement. Although one party will inevitably disagree with the commission's outcome, this is not a situation where the intervention of the federal courts is necessary to vindicate federal rights. If *Ex Parte Young* applies here, it will essentially provide an alternate federal forum for state administrative agency review every time a case raises mixed questions of state and federal law. This is not the purpose of the exception to Eleventh Amendment immunity set forth in *Ex Parte Young*.

Ex Parte Young involved actions by state officials that violated the Fourteenth Amendment. 209 U.S. at 148-49.

Noting that the Eleventh Amendment prohibited actions against the states while the Fourteenth Amendment was specifically directed at state action, *id.*, the Supreme Court ruled that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten ... to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.* The Court reasoned, "The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect the state in its sovereign or governmental capacity." *Id* at 159-60. Thus, the state officer is "stripped" of his official character and is not protected by the Eleventh Amendment. *Id.*

Since *Ex Parte Young*, the Court has affirmed its vitality as a necessary means to ensure compliance with the Fourteenth Amendment and the supremacy of federal law. See, *Edelman v. Jordan*, *supra*, 451 U.S. at 664 (*Ex Parte Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."); *Green v. Mansour, supra*, 474 U.S. at 68 ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). However, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst v. Halderman, supra,* 465 U.S. at 102. The exception has been limited to actions for prospective injunctive relief against ongoing violations of federal law. *Edelman, supra,* 415 U.S. 651. It has been found inapplicable to actions seeking compliance with state law. *Pennhurst, supra,* 465 U.S. 89. It has also been found inapplicable where Congress has otherwise provided a remedy for the federal violation at issue. *Seminole Tribe, supra,* 517 U.S. 44.

In *Seminole*, the Court's decision was based on its view that "[t]he situation presented here ... is sufficiently different from that giving rise to the traditional Ex Parte Young action so as to preclude the availability of that doctrine." *Id.* at 73. The Court elaborated on this in *Idaho v. Coeur d'Ilene,* 521 U.S. 261 (1997) in which, while not questioning the continued validity of the *Ex Parte Young* fiction, the Court acknowledged that "the state itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Id.* at 269. Thus, the Court found that *Ex Parte Young* does not apply simply because the complaint asks for prospective injunctive relief against state officials:

> To interpret Young to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in Seminole Tribe, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. [*Id.* at 270].

Here, applying *Ex Parte Young* would be contrary to the real interests served by the Eleventh Amendment. This is not a case where proceeding under *Ex Parte Young* is necessary to vindicate federal rights or ensure the supremacy of federal law. The state commission here did everything required of it under the statute. It simply reached a result, as a matter of contract

interpretation, that one party to the contract disputes.* Although that party may believe that there has been an error of law, the state commission's actions here are the actions of the sovereign and do not fit the parameters of the *Ex Parte Young* fiction. In *Pennhurst, supra*, 465 U.S. at 113, the Court stated "at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it." See also, *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 695 (1949) (" if the actions of an officer do not conflict with the terms of his valid

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* That result is not even inconsistent with federal law. The Court below noted that the F.C.C. had issued a declaratory ruling after this case was filed that set forth its view that calls to internet service providers were not local calls. 179 F.3d at 571. See, *Bell Atlantic Telephone Co. v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000) (reversing and remanding the F.C.C.'s decision for an explanation of the agency's reasoning). The Court below also noted, however, that the F.C.C. had ruled that parties could agree to compensate each other for such calls during negotiations, and that the interpretation of agreements entered into prior to the declaratory ruling should be made by the state commissions. 179 F.3d at 572-73. See also, *In the Matter of Implementation of the Local Competition Provisions in the Ttelecommunications Act of 1996*, Dkt. Nos. 96-98, 99-68, -- F.C.C. Rcd. ---, 2001 WL 431687 (F.C.C.) (April 27, 2001) (determining that compensation for internet bound calls is subject to F.C.C. jurisdiction, establishing an interim cost recovery method pending additional proceedings, but specifically stating "[t]his Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."). In this case, the parties specifically included in their agreement that the state commission would have the right to define local traffic for reciprocal compensation purposes. 179 F.3d at 572-73. The state commission's decision therefore was fully within its authority and, it appears, consistent with federal law. *Id.* at 572. This is not a situation where the commissioners must be "stripped" of their official immunity in order to protect federal rights.

statutory authority, then they are the actions of the sovereign..." and "cannot be enjoined or directed....").

What this is, in essence, is an appeal of administrative agency action. Normal state procedures for the review of final agency action are available. Invoking *Ex Parte Young* to allow an appeal of state agency action in federal court is inconsistent with principles of federalism. See, *Rooker v. Fidelity Trust Co., supra,* 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman, supra*, 460 U.S. 462 (1983). See also, *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369 (1989) ("[T]he State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign."). Although the review entails questions of both state and federal law, 179 F.3d at 574, state courts are more than capable of reviewing the federal law aspects of this case. See, *Testa v. Katt, supra*, 330 U.S. 386. In fact, the state court may be a preferable forum. As noted by the Court below, the allocation of authority between state and federal courts that results from its decision, "has a potential to cause problems." 179 F.3d at 573. As the Court explained, "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no."" *Id.* at 574.*

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* Ironically, the Court states further that this problem is for the legislative branch to repair, without acknowledging that the extension of federal jurisdiction to enforcement actions was of judicial making. See Point I, above.

The inappropriateness of extending *Ex Parte Young* to this case is evident when one examines what a federal action here would look like. With the individual state commissioners as the defendants, the redressibility of plaintiffs' claims is called into question. Generally, the state commissioners act as a body, with a majority vote required to bind the commission. Ill. Cons. Stat. Ch. 220 § 5/2-101. Although the Court below held that the alleged violation of federal law in this case was "ongoing," a favorable ruling for plaintiffs would at best result in an order commanding each individual commissioner to vote in a particular way in the future if the issue comes before the commission again. Assuming such an order could be issued, see, *Pennhurst, supra,* 465 U.S. at 117; *Printz v. U.S., supra*, 521 U.S. 898, there is no guarantee, unless the federal court remands to the state commission, that this term of the contract between these parties will come before the commission again or that the same commissioners will still be in office to review it. See, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Moreover, a remand to the commission for the individual commissioners to vote as the District Court directs, serves no purpose. The real purpose of appealing the commission's decision is to have the Court determine if that decision is contrary to law, and reverse it if it is. This can easily be accomplished in the state court proceedings without threatening any federal rights or the supremacy of federal law.

As in *Seminole Tribe*, "the situation presented here is sufficiently different from that giving rise to the traditional Ex Parte Young action so as to preclude the availability of that doctrine." 517 U.S. at 73. Simply styling the action as a request for prospective injunctive relief against the state commissioners does not transform this action into anything other than what it is -- an appeal of state administrative agency action in the federal court. Applying *Ex Parte Young* would not be consistent with this Court's recognition of the Eleventh

Amendment's real limitation on the power of the federal government. Accordingly, as an *Ex Parte Young* action is not necessary in this instance to vindicate federal rights or law, the matter should proceed through normal state court review to determine if the decision of the commission was arbitrary, capricious or contrary to law.

CONCLUSION

For the foregoing reasons, the decision below finding federal court jurisdiction over state commission decisions enforcing or interpreting interconnection agreements should be reversed. Such jurisdiction is contrary to the language and structure of the Telecommunications Act and the Eleventh Amendment to the Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

MATHIAS, RICHARD L., ET AL.
PETITIONERS,

V.

WORLDCOM TECH., INC., ET AL.
RESPONDENTS

Writ of Certiorari to the Seventh
Circuit Court of Appeals

BRIEF FOR COALITION FOR LOCAL SOVEREIGNTY SUPPORTING THE PETITIONER

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24 pp

Questions Presented

Can Congress require States to enforce the 1996 Telecommunications Act, or restrict the jurisdiction of State courts over State agencies?

Does a State's decision to voluntarily cooperate with provisions of the 1996 Telecommunications Act constitute a voluntary waiver of its immunity from suit in federal court?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state and local officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, and counsel to the respondent, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY

When Congress passed the Telecommunications Act of 1996, it choose to rely upon "the vast resources and expertise of State public service commissions"(*Bell Atlantic v. MCI*) for resolving disputes which might arise regarding intra-state phone service, rather than attempting to provide a separate federal forum to resolve various issues. Congress, however, did provide that if a State refused or neglected to perform various functions foreseen by the Act that the FCC would set up its own system instead.

This system by which Congress and the FCC makes use of existing state structures has been termed "participation" of state agencies in a federal regulatory program – although we believe it would be more accurate to describe the States' activity as "cooperation with" the federal government, rather than "participation in" it.

This cooperation with the federal government is

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

completely voluntary on the part of the State, and, in effect, is doing the federal government a favor by saving the federal government the expense of having to perform various types of actions, such as mediating disputes and applying State contract law.

In passing the Telecommunications Act of 1996, Congress could not have overridden a State's Elventh Amendment Immunity to private suit in federal court (*Seminole Tribe*, 517 US 44 (1996)), nor does a State's voluntary cooperation with a federal program even remotely constitute a waiver of that immunity, since this Court has ruled that a State's consent to suit must be "unequivocally expressed" (*Pennhurst*, 465 US 89, 99)) and "altogether voluntary" (*Beers v. Arkansas*, 20 How., at 529).

Portions of the Telecom Act of 1996 which attempt to strip State courts of jurisdiction over actions of State agencies, and which suggest that Congress tried to "commandeer" State agencies, are clearly unconstitutional as they run afoul of this Court's recent Tenth Amendment (*New York v. US* (505 US 144 (1992)), *Printz v. US* (no 95-1478 (1997))), and Elventh Amendment cases.

ARGUMENT

I. Congress may neither commandeer State agencies nor strip State courts of jurisdiction over State agencies.

It is clear that neither Congress nor the FCC can require any State agency to enforce any section of the Telecommunications Act. This Court made that clear in *New York* v. *US* (505 US 144 (1992)) and *Printz v. US* (no 95-1478 (1997)): "The federal government may neither issue directives requiring the States to address particular problems,

nor command the States' officers, or those of their political subdivisions to enforce a federal regulatory program." Title 47 sections 251 & 252 clearly fall within the *Printz* doctrine. Congress has no authority to require States to participate; if they choose to do so, it is purely voluntary.

The 1996 Telecommunications Act passed a year before this Court's most explicit statement in *Printz v. US*, seems to assume that Congress could require State utility commissions to enforce parts of the act, just as an earlier Congress required sheriffs to enforce parts of the Brady Bill.

In numerous places the Act uses the language that, "The State commission shall" (as for example in 252 (b)(4)(c) "The State commission shall resolve each issue set forth in the petition and the response." In addition "the Act actually conscripts State governmental agencies for federal purposes. See, e.g., 47 U.S.C. §§ 251(f) (mandating that State commissions conduct inquiries for the purpose of terminating rural telephone company exemptions); 47 U.S.C. §§ 332(c)(7) (requiring local zoning boards to apply federal procedural standards in approving the siting of telecommunications towers and facilities)" (Bell Atlantic v. MCI, Fourth Circuit).

These statements are mitigated somewhat by Congress's failure to impose any penalty on State commissions which refuse to participate. Section 252(b)(5) simply provides that "If a State commission fails to act to carry out its *responsibility* under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction" [emphasis added].

While one could argue that Congress acknowledged the voluntary nature of state participation by placing no penalties on the state other than that the FCC will do the job

instead, the fact that Congress claims that States have a "responsibility under this section" to carry out the provisions of the act, indicates quite strongly that Congress incorrectly *assumed* that it could legally command state agencies to carry out provisions of the act.

The fact that Congress could not require States to cooperate is acknowledged by the United States. As the Fourth Circuit noted in *Bell Atlantic* "the United States, as an intervenor . . . note[s] that the State had a clear choice -- given in 47 U.S.C. §§ 252(e)(5) -- either to participate in the regulation of interconnection agreements or to forego such a role and allow the FCC to act in its stead" (992459P (2001)).

The incorrect assumption by Congress that it could commandeer State agencies, is all the more clear and reaches its most destructive element in 252(e)(6) in which Congress declared that **"no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."**

This provision begins to bear very directly on the issues in the present case, and seems to be matter of disagreement between the Fourth and Seventh Circuits. The Fourth Circuit in *Bell Atlantic* notes that according to Maryland law "Any 'party or person' who is 'dissatisfied' with any final decision or order of the Public Service Commission may seek judicial review in the State circuit court" because "the Maryland Public Service Commission's determination in this case was not a §§ 252 determination." The Seventh Circuit believes that such suits are preempted by the Act. Neither Court, however, seems to have asked whether Congress had constitutional power to 'preempt' State court jurisdiction over State agencies.

Fortunately, the issue here is quite clear -- given this Court's pronouncements in *New York*, and *Printz* -- that Congress may not deprive a State court of jurisdiction over State agencies. It also runs afoul of the principle – recently reaffirmed by this Court in *Bush v. Palm Beach County* (00-

836) that "It is fundamental that state courts be left free and unfettered by us in their interpretation of state constitutions" (quoting *Minnesota v. National Tea Co.*, 309 US 557 (1940). The Telecom Act tried to forbid state courts from addressing issues of State law which will surely arise from time to time by the actions of State agencies.

Congress's attempt to limit the jurisdiction of State courts over State agencies is also contrary to this Court's recent ruling in *Alden v. Maine* which declared: "A State is entitled to order the processes of its own governance . . . . If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very constitution from which its existence derives."

In addition to being contrary to the fundamental principle that State courts must be left free to interpret State law, Congress's requirement that State courts could not review actions by State commissions, is clearly predicated upon the false assumption that Congress could validly commandeer State agencies. Congress must have assumed that once a State agency is commandeered by the federal government that the agency is no longer acting as an agent of the State but only as an agent of the federal government. Presumably under such circumstances, State courts would have no more jurisdiction over the actions of a deputized State agency than it would over any other federal agency.[2]

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[2] We believe Congress could not totally immunize even federal officials from all suit in state court (much less State officials). This is question which may soon need to be addressed by this Court, if it decides to review STATE OF IDAHO v HORIUCHI (Ninth Circuit, No. 9830149). Congress could restrict federal court jurisdiction over officials (such jurisdiction

For this theory to be true it relies on the assumption that Congress may forcibly deputize or commandeer state agents or agencies such that they are, in effect, no longer state agencies, at least insofar as they enforce federal regulations. In other words, Congress must have reasoned that when a State commission acts under authority of federal statutes, rather than under State law, that no matters of State law apply. This Court has made clear, however, that Congress may not commandeer State agencies or officials, and their participation in helping enforce federal regulations is purely voluntary.

Since participation by state agencies is voluntary, mandatory State laws governing the actions of state commissions must take precedence over any voluntary action a state agency might decide to take on behalf of the federal government.

We belief this principle is beyond dispute; but to illustrate, let us take an example from the *Printz* case. The Brady Bill told the chief law enforcement officer (CLEO) of each county or city to provide background checks, but these actions, as this Court has declared, were purely voluntary. What if a state passed a law setting up a central state agency to perform background checks for gun purchases and forbad sheriffs from performing this function?

We believe it is obvious that CLEOs would be

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does not come under this Court's original jurisdiction, and therefore is subject to restriction by Congress). If Congress could also prohibit state courts from hearing suits against government officials, that would allow the disturbing prospect that government officials could be exempt from prosecution in any court; a situation which this Court has said would be "a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights" (*Lee v. US*, 106 US 196).

required to follow the state law, which they are sworn to uphold, and could not violate that law simply because the federal government had invited them voluntarily to do so. The CLEO could not ignore his responsibility under State law by claiming to act only under authority of a federal statute.

It follows from these considerations that State officials and State agencies remain subject to State law before, during and after any voluntary enforcement of federal laws.

If State agencies remain subject to State law even while voluntarily performing functions on behalf of the federal government, then it must be the case that State courts also retain jurisdiction over enforcement of such laws.

We believe, therefore, that Congress clearly acted unconstitutionally in attempting to strip State courts of jurisdiction over State agencies which act in cooperation with provisions of the Telecommunications Act.

The seventh circuit decision relied heavily on the Congressional exclusion of State courts for its decision. It reasoned – plausibly enough – that if Congress had denied jurisdiction to State courts that it must have assumed that federal courts would exercise jurisdiction. ("Subsection 252(e)(4), [denying jurisdiction to state courts] when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court.") While this is a plausible inference, the fact that Congress clearly exceeded its authority in trying to strip State courts of jurisdiction, invalidates the Seventh Circuit argument which rested on the assumption of constitutionality for denying State jurisdiction. Indeed, the Seventh Circuit's clear misunderstanding of the principle laid down in Printz, must call into question its entire opinion.

Moreover, even the Seventh Circuit itself, noted that such a conclusion resulted in practical difficulties which "may not have much to recommend it." The Seventh Circuit

concluded its opinion by declaring.

> Federal jurisdiction under 252(e)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no." This system may not have much to recommend it, but, as the Supreme Court observed in Iowa Utilities Board, the 1996 Act has its share of glitches, and if this is another, then the legislature can provide a repair.

Thus we believe that the idea that federal jurisdiction is exclusive is not only unconstitutional, but (in the admission of the lower court) largely unworkable.

It might indeed raise a problem if State utility commissions in cooperating with the Telcom Act were unable to be reviewed in federal court due to the Eleventh Amendment and were also unable to be reviewed in State court due to 252(e)(6). However, this difficulty is easily overcome by the recognition that 252(e)(6) is unconstitutional, and State utility commissions, like other State agencies, remain subject to whatever State court review the State legislature has provided. The disagreement between the conflict circuit courts is easily resolved by this recognition that Congress exceeded its authority under 252.

II. Voluntary State cooperation with a Congressionally enacted scheme is not consent to be sued

The United States and the Seventh Circuit maintain that States have "implicitly" waived their Eleventh

Amendment immunity "by perticipating in the regulatory scheme established by the 1996 Act." We believe this doctrine of "implicit consent" so recently rejected by this Court, ought not be invoked again.

The Seventh Circuit relies in the present case on its decision in *MCI et al v. Illinois Commerce Commission* (168 F.3d 315 (7th Circuit 1999)), in which the Seventh Circuit declared: "For reasons that follow, we hold that the Eleventh Amendment does not bar such suits against the state commissions and their commissioners because, in the particular circumstances in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act."

The Seventh Circuit incorrectly assumes that when a State commission acts in conformity with provisions of the Telecommunications Act, that the Commission is acting solely under authority of that Act. That presumption need not be true, and, in fact, is probably never true. As the Fourth Circuit has noted "State commissions have authority to interpret and enforce interconnection agreements" under State law (Md. Code Ann., Pub. Util. Cos. 2-113).

Even when State commissions act in accordance with the federal Telecom Act, the commissions are not acting "under the authority" of the federal act (at least, not exclusively), but are acting "under the authority of State law. Even if the Telecome Act of 1996 did not exist, the type of action of State commission at issue in the current case could still have proceeded under State law. State commissions would not exist at all, to help enforce the Telecom Act, if not for existing State law which constitutes the commission to begin with, and which invests them with authority under State law.

For example, the Telecom Act provided that a State may mediate disputes: "Any party negotiating an agreement

under this section *may*, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation." Mediating disputes between local companies is most likely a function that some state agency performed long before the 1996 Act, and continues to perform. In fact, mediating disputes between state citizens and companies is not limited to telecom companies but is a service provided by the state for anyone who cares to make use of it.

Congress simply took advantage of a pre-existing State function to streamline the federal process: "Congress appropriately recognized the benefit of employing the vast resources and expertise of State public service commissions" (*Bell Atlantic*). It is Congress that has elected to "participate in" State the services provided by State commissions, and not the other way around.

State commissions are only continuing to carry out provisions of State law which remain in effect, and which were enacted prior to the Telecom Act of 1996. The Seventh Circuit interprets a State's failure to repeal an existing State law, or change an existing State policy, as "consent" to be sued. Such a theory is all the more preposterous given that no State legislature could have possibly known – short of a determination by this Court – that repeal of existing State laws would be necessary in order for a State to protect its immunity.

A. Consent must be explicit and voluntary.

The theory of implicit consent is clearly contrary to this Court's recent pronouncement in *Florida Prepaid v. College Savings Bank* (98-531, (1999) that

> there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity.

The theory in the present case goes so far as to suggest that if a State *fails* to take certain action it will be deemed to have waived immunity.

When two telecom companies make use of the State mediation process, it is far from the case that the State commission is "acting under the authority" of the federal telecom act; rather, it is simply doing what it has always done, with or without the federal statute. If this is the case, then the State commission is not acting under authority of any federal statute, nor can the State be said to have voluntarily consented to participate in enforcing a federal scheme. On the contrary, it is Congress which has chosen to voluntarily make use of a pre-existing State set-up.

Far from Congress giving the States a "gift," or doing them a favor, by allowing them to cooperate with the FCC, rather it is the States who are doing a huge favor for the FCC by "employing their vast resources and expertise" which enormously benefits the federal government.

If the federal government does not like the way a State handles such cases then it is free to set up its own independent process in the FCC, but it cannot command a State to perform differently when the State's assistance is purely voluntary. We believe it would be a novel and dangerous doctrine to imagine that Congress could extend the jurisdiction of the federal courts to matters previously reserved to the States, simply by making use of already existing State structures.

For example, Congress might pass a law requiring that for child custody disputes arising on military bases that the servicemen will need to use the already existing family courts

of the State in which the base is located. It would not be accurate to describe such a situation as one in which the State has agreed to participate in a federal law, but rather that the federal government has decided to make use of a State agency rather than set-up a family law section for military courts. It would certainly not be true that State family courts would suddenly become instruments of the federal government simply by virtue of doing what they always do, or that this would constitute some sort of consent waiving State immunity.

The situation with respect to the Telecommunications Act is quite similar. State agencies are enforcing State contract law, with respect to disputes between companies. This is a State function which States have always done. Simply continuing to do what they have always done, and are required to do under State law, hardly constitutes a voluntary waiver of immunity by "participating" in a federal scheme.

Moreover, when State commissions engage in resolutions of issue involving State contract law, they are not acting under authority of the federal government, but under authority of the state government.

The doctrine of voluntary, implicit consent argued for by the Seventh Circuit, is thus remarkably similar to the *Parden* doctrine which this Court has recently repudiated. *Parden*, of course, alleged that by simply engaging in a commercial activity which would – if carried on by a private entity, be subject to suit in federal court – that a State had implicitly waived its immunity. The Seventh Circuit in the current case makes the exact same argument: that by simply carrying on a certain type of activity, such action constitutes an implicit, voluntary consent to waive immunity.

This Court has used numerous formulations to describe the "stringent" test for determining "whether a State has waived its immunity from *federal-court" Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 241 (1985). In

Great Northen Life v. Read (322 U. S. 47 (1944)) this Court said that there must be"a clear declaration of the state's intention to submit" to suit. In *Pennhurst State School and Hospital* v. *Halderman* , 465 U. S. 89, 99 (1984) (State's consent to suit must be "unequivocally expressed"). In *Beers* this court also declared that any decision be "altogether voluntary" *Beers v. Arkansas*, 20 How. 527 (1858)).

The present case clearly meets none of these requirements.

The Seventh Circuit's ruling in the present case, is so remarkably similar to *Parden* and so obviously contrary to this Court's recent ruling in *College Savings Bank*, that we see little reason to belabor the obvious here. We agree wholeheartedly with the observation of the Fourth Circuit in *Bell Atlantic* that "This argument is strikingly reminiscent of, and arguably weaker than, the argument made by the injured employee in *Parden*, 377 U.S. 184 (1964), overruled by *College Savings Bank*."

In our brief for College Savings Bank, Coalition for Local Sovereignty had advocated an explicit repudiation of *Parden*, and so it seems to us we have a special interest in seeing that it is never revived.

The Seventh Circuit, not only seeks to reinstate *Parden* – so recently overturned by this Court – but even to extend it. *Parden* relied upon a distinction between core functions of a State government, such as running police or courts, and non-core functions such as operating a commercial enterprise such as a railroad. The Seventh Circuit, however, seeks to expand the *Parden* exception even to core sovereign functions, as the operation of a public utilities commission clearly is. Upholding such a doctrine would be a complete reversal and repudiation of this Court's recent jurisprudence.

The Doctrine of "implicit consent" or "constructive consent" are constitutional solecisms. Despite the fact that

this Court overturned *Parden* and rejected the idea it has nevertheless bared its head again. We respectfully suggest that this Court should perhaps drive a stake through the heart of the doctrine once and for all by invoking the strongest possible language against it.

III. Even the doctrine of explicit consent is constitutionally suspect.

Indeed, we believe that the Eleventh Amendment means what it says, and that State governments may not waive immunity. The Eleventh Amendment is not phrased as a right or prerogative of States, but a restriction on the federal courts. The wording is clear: "The judicial power of the United States shall not be construed to extend to any suit . . ." It does not add "unless a state consents to it."

It is no more plausible to suggest that States may allow the federal government to violate the Eleventh Amendment than that states could allow the federal government to violate the First Amendment. After all, the language in the first and the Eleventh Amendments are similar: "Congress shall make no law" and "The judicial power .. shall not ... extend." As this court has repeatedly noted, the purpose of federalism and division of powers is not to protect states, but to protect the liberty of the people. As this Court noted most forcefully in New York:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of

> sovereign power." . . . Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. ... State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. *New York v. US*, 505 U.S. 144 (1992).

It is equally true that state officials cannot consent to the enlargement of the powers of the judiciary beyond those restrictions specifically placed on it by the Constitution. We believe that this Court's statement in New York is absolutely right, and that the Court's decision in *Clark v. Barnard* (108 U. S., at 447) that a State's sovereignty is "a personal privilege which it may waive at pleasure" is wrong, and clearly opposed to the principles espoused in *New York*.

While we do not expect this Court in the present case to repudiate the doctrine of *Clark* (as a faithful reading of the Eleventh Amendment would require) we do point out these consideration to show just how far from the requirements of the Eleventh Amendment the doctrine of implicit consent really is.

Moreover, we would suggest that this Court move towards a more limited and enforcable doctrine of "consent." For example, this Court could declare that a state shall never be deemed to have consented to suit in federal court unless the legislature has specifically passed a law specifically consenting to that type of suit. This would be in correspondence with this Court's observation in *Alden* that "Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits." A judgement by this Court that such statutes are required before a federal court may claim consent would go a long way towards eliminating claims of consent based on the type of ephemeral claims we have witnessed over the years.

Given the seriousness of suits against states to a

State's independence, we view consent of a State's governor or attorney general as clearly inadequate, and contrary prior formulations of this Court. That a governor, or any other State official on his own could (without the approval of the State legislature) consent to a suit and subject a State to costly suit in federal court, for instance, would constitute an end run around the principle of legislative control and popular sovereignty.

In *New York v. US*, some had argued that support of the State's former governor for the law at issue was sufficient constitute consent of the State to the law at issue. While this Court clearly rejected that far-fetched claim, earlier statements such as found in *New York v. US*, *College Savings Bank*, and *Alden* have not deterred lower federal courts from continuing to find some ephemeral basis for suggesting consent by non-consenting states. Since this Court cannot possibly review each claim of consent on a case by case basis, it seems proper to set down clear limits for lower court about when consent has occurred. Moreover, the bar should be set quite high.

IV. Invoking the Ex parte Young exception runs afoul of recent statements of this Court

Invocation of the *Ex Parte Young* fiction (that a State really is not a party to the suit despite all appearances to the contrary), is clearly misplaced in the present case. Even if one accepts the basic premise of *Young* may be invoked to halt ongoing violations of federal edicts by State officials, no violation of federal statutes has occurred here.

States may either regulate in accordance with the guidelines set forth by Congress or they may choose not to. We emphasize these are merely "guidelines" since States cannot be required to enforce them. If States choose not to regulate in accordance with the guidelines laid out by

Congress (or the FCC) then the FCC may act in place of the State.

The United States seems to argue that while "participation" is voluntary, if the State chooses to participate that it must follow the prescriptions of Congress or be in violation of federal law. This is impossible, however.

To use *Printz* as an example, the Brady Bill attempted to require sheriffs to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever state or local record systems are available and in a national system designated by the Attorney General" (922(s)). Let us suppose that a sheriff elects to voluntarily "participate" in the background check requirement, however, he decides to use his own entirely different method to do those checks – for example, refusing to make use of the national system. It could not be true that such a sheriff was in violation of federal law, because he refused to follow the guidelines set by Congress. If the action is voluntary to start with, then the means whereby that action is carried out must also be voluntary.

Just so, the failure of a State to implement FCC determinations can hardly be said to be a violation of federal requirement, when the State has no legal obligation to act at all. If the FCC does not like the way a State commission is doing business, it is free to do the job itself

In previous briefs Coalition for Local Sovereignty has argued that *Ex parte Young*, was wrongly decided, is internally contradictory (what this Court has termed "a fiction"), and should be overturned – or at very least more specific guidelines given so that lower courts may not invoke Young at the drop of a hat. Like the "consent" doctrine, some lower courts – including the Seventh Circuit in the current case – are all to ready to invoke the Young fiction on the flimsiest of pretexts.

The Seventh Circuit's attempt to invoke *Young* clearly

runs afoul of this Court's recent pattern of steering clear of *Young*, best expressed in *Idaho v Ceour d'Alene Tribe* which declared:

> To interpret Young to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in Seminole Tribe, that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Ceour d'Alene went on to declare that "As no one disputes, the Young fiction is an exercise in line drawing. There is no reason why the line cannot be drawn to reflect the real interests of States consistent with the clarity and certainty appropriate to the Eleventh Amendment's jurisdictional inquiry." Nevertheless, that case presented no barrier for lower Courts to draw the line anywhere a federal judge happened to wish to draw it.

In Seminole, this Court did attempt to provide some guidance about where to "draw the line" declaring that "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Seminole, 517 U.S. at 74. The language, here, that a court should "hesitate," does not

preclude the possibility for a court to act anyway, and in fact, places no restrictions at all upon lower courts' invocation of Young.

This Court seems intent on ensuring "that the sovereign immunity doctrine remains meaningful" (Ceour d'Alene), and by its example of refusing to invoke Young in each of its many Eleventh Amendment cases decided in recent years, has tried to give direction to the lower courts. However, the large number of Eleventh Amendment cases which this Court has been forced to hear and overturn over the last 5 years is testimony to the fact that lower courts have failed to follow the example of this Court.

One possibility to limit the reach of Young would be for this Court to declare that it can be invoked only in Fourteenth Amendment cases, which is probably what the original decision in Young intended.[3]

CONCLUSION

Over the years, previous Courts which were hostile to the Eleventh Amendment tried to carve out various exceptions to it. At least in the interval between *Parden* and *Seminole Tribe*, we witnessed a steady erosion of the Eleventh Amendment, which this Court has reversed in the last five years.

Nevertheless, a minority on this Court (but apparently a majority on some lower courts) has signaled that "they are

[3] The *Young* court seems to have been searching for a mechanism to enforce the Fourteenth Amendment, but was not so brazen to think it could simply declare the Eleventh Amendment cancelled with respect to the Fourteenth. Given that this Court seems determined (for the time being) to stand behind *Fitzpatrick*, the need for *Young* seems to have passed, and folding *Young* into *Fitzpatrick* would help create a more clean and coherent Eleventh Amendment jurisprudence.

'not *yet* ready,' to adhere to the still-warm precedent of *Seminole Tribe* and to the 110-year-old decision in *Hans* that supports it" (College Savings Bank). Despite literally dozens of precedents to the contrary stretching back to the earliest days of the Republic, opponents of the Eleventh Amendment adhere only to a few singular precedents which include *Chisholm*, *Young*, *Parden* and *Union Gas* (see College Savings Bank, footnote 5), while ignoring "constitutional tradition and precedent as clear and conclusive, and almost as venerable, as that which consigns debate over whether *Marbury* v. *Madison* was wrongly decided to forums more other-worldly than ours" (College Savings Bank).

It is almost hard to imagine how the Seventh Circuit – among others – could posit a theory so remarkably similar to *Parden* except for simple refusal to adhere to the still warm precedent of *College Savings Bank*, plus the more than a century of jurisprudence which supports it.

While Courts understandably try to steer clear of broad general pronouncements, we can only suggest that some very strong general guidelines for lower courts may be in order here if this Court wishes to avoid retracing the same steps over and over as lower courts seem to refuse to apply what should be clear precedents.

For these reasons we urge that the ruling of the Seventh Circuit Court of Appeals be reversed.

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IN THE
Supreme Court of the United States
OCTOBER TERM 2001

RICHARD L. MATHIAS, ET AL.,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, ET AL.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, KENTUCKY PUBLIC SERVICE COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, NEW YORK PUBLIC SERVICE COMMISSION, MISSOURI PUBLIC SERVICE COMMISSION, AND PUBLIC UTILITIES COMMISSION OF NEVADA SUPPORTING PETITIONER

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QUESTIONS PRESENTED[1]

1. Whether a State commission's action relating to the enforcement of a previously approved § 252 interconnection agreement is a "determination under [§ 252]" and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6)?

2. Whether a State commission's enforcement of interconnection agreements for the provision of local telephone service under § 252 of the Telecommunications Act, which provides that State determinations are reviewable in federal court, constitutes a waiver of 11th Amendment immunity?

3. Whether an action seeking prospective relief against State public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine?

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[1] The issues were specified by this Court when granting certiorari at *Mathias v. WorldCom Technologies, Inc.*, 121 S.Ct. 1224 (Mem), 149 L.Ed.2d 135, 69 USLW 3399, 69 USLW 3585, 69 USLW 3592 U.S. (March 05, 2001).

LIST OF PARTIES BELOW

Pursuant to U.S. Sup.Ct. Rule 29.6, 28 U.S.C.A., NARUC states as follows: NARUC is supported predominantly by dues paid by its State public utility commission members and through revenues generated by three meetings each year of those members. NARUC has no parent company, subsidiary, or affiliate.

The Parties to the proceeding before the 7th Circuit follow: (1) Illinois Bell Telephone Company d/b/a Ameritech Illinois, (2) Worldcom Technologies, Inc., (3) Teleport Communications Group, Inc., (4) Illinois Commerce Commission, and (5) Focal Communications. NARUC and others filed as *amici*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications

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[1] In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. In addition, pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC states the following: (1) NARUC's General Counsel authored this brief with the assistance of NARUC's member commissions, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC made a financial contribution to the preparation or submission of this brief.

common carriers within their respective borders. Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.[2]

The *Kentucky Public Service Commission, Louisiana Public Service Commission, New York Public Service Commission, Missouri Public Service Commission, and Nevada Public Utilities Commission* felt so strongly about the issues presented for review that they not only assisted in the drafting of this joint brief, but also co-signed as *amici*. NARUC's member commissions, including the five listed *supra* separately joining this brief, regulate intrastate telecommunications services and particularly the local service supplied by incumbent local exchange carriers ("ILECs), like Illinois Bell Telephone Company, in the territories these ILECs serve. These commissions are obligated to ensure local telephone service supplied by the ILECs is provided at just and reasonable rates. They have a further interest to encourage the ILECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory

2 See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. See also 47 U.S.C. § 254 (1996). See also *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

provisions[3] specifying ILEC obligations to interconnect and provide nondiscriminatory access to competitors. See 47 U.S.C. § 252 (1996).

Historically, State Commissions have always had oversight and enforcement responsibilities, pursuant to their individual State enabling statutes, of carrier-to-carrier interconnection agreements similar to the ones that gave rise to this appeal. The three specific issues designated for review will unequivocally impact NARUC member commission actions in future interconnection enforcement cases. Moreover, the 7th Circuit's expansive application of the *Ex parte Young* doctrine and interpretation of this Court's decisions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (*College Savings*), *Alden v. Maine*, 527 U.S. 706 (1999) (*Alden*), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) carry the threat of inappropriately subjecting State commission activities across other regulated industry sectors to private party suits in federal courts. Because of that impact, NARUC's *counsel has been specifically instructed by all of its members to support the Illinois commission in this litigation.*

State commissions have an obvious interest in protecting their scarce resources, sovereignty, and the integrity of their procedures from non-consensual private-party suits in federal court in violation of the 11th

3 *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 *et seq.*, Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act" or "Act").

Amendment. To protect these interests, NARUC and the Kentucky, Louisiana, Missouri, New York and Nevada commissions, continue to oppose all unwarranted expansions of the narrow exemptions to the 11th amendment like those in the 7th Circuit decision presented for review.

SUMMARY OF ARGUMENT

Because State sovereign immunity to private nonconsensual suits in federal courts is a vital principle of our federal constitutional structure, this Court has strictly construed the three permissible exceptions: (1) express Congressional abrogation, (2) State voluntary or constructive waiver, or (3) application of the *Ex parte Young* doctrine. Congressional abrogation cannot be seriously considered, so the focus must turn to whether States' have waived their immunity or if the *Ex parte Young* doctrine is applicable.

Any analysis must begin with the text of § 252. Basic tenets of statutory construction, the express terms of the 1996 Act itself in § 601, and Supreme Court jurisprudence require a narrow reading of § 252. *The "plain language" of § 252(e)(6) does not expressly confer jurisdiction on federal courts to review State orders enforcing interconnection agreements.* The section purports to confer jurisdiction only to review State "determinations" made under § 252 to determine if the agreements "meet[] the requirements of [§§ 251 and 252]." This Court has always insisted that statutes conferring jurisdiction on federal courts be strictly construed. Moreover, Congress provided specific instructions on how to construe § 252 in § 601(c) which specifies that section "shall not be construed to modify, impair, or supercede . . .State . . . law unless expressly so provided." A strict construction of § 252 is particularly

appropriate because *federal statutes cannot confer additional authority on any State agency.* Instead, Congress either: (1) lifts federal statutory restraints on *existing* State authority, or (2) preempts *existing* State authority to act. *Clearly, § 252 must therefore be viewed as an incursion on existing State authority rather than as a grant of "new" authority.* If the proscription against "implying" preemption does not apply, to discern Congress' view of the scope of review authority, this Court must engage in one of two possible illogical exercises. Both require the Court to "imply" a Congressional "grant" of authority where the States already inherently possess it. Neither exercise accords with Congress' expressed intent – as evidenced by both the plain text and § 601(c)'s proscription. Finally, adopting the plain-language reading of §252(e)(6) advanced *supra* clearly allows the Court to follow its general rule to avoid considering grave constitutional issues where possible. The text and applicable rules of construction demonstrate that State enforcement actions cannot be construed as a "determination under [§ 252]" and thus are not reviewable in federal courts. Moreover, even if such decisions are considered, *arguendo*, to be subject to §252(e)(6), that section's applicability is far from explicit, and the States cannot be understood to have voluntarily subjected themselves to its provisions.

Since there is no evidence, or even allegation, that the Illinois Commission expressly waived its immunity by statute or constitutional provision, ultimately, the second issue presented for review must turn on the issue of constructive waiver. Because the 1996 Act (1) impacts a core State regulatory function involving an exercise of police power, (2) does not present States with a viable choice, and

(3) provides no "gift" or benefit, it presents a far stronger case for State immunity than that presented to this Court in the recent landmark *College Savings* decision where the issue was whether the State would be given immunity for actions removed from core State functions. There is no "gift", no implied waiver, no Congressional abrogation, and no express State waiver. Therefore, for the Illinois Commission's enforcement orders to be subject to federal court review, it must fall within the *Ex parte Young* exemption. A close examination of the relevant case law and the text of the Act shows it does not.

Like the statute at issue in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Telecommunications Act provides detailed provisions for compulsory arbitration of interconnection agreements. Also, the 1996 Act contains no evidence Congress intended to subject individual State officials to federal suits. According to this Court, where a statutory scheme unmistakably "permits" a State or its agency to act, as opposed to an individual State official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Seminole*, 517 U.S. at 75 n.17. In the 1996 Act, all of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and none of the provisions refer to individual State commissioners. If the logic of *Seminole* prevails, such references eliminate *Ex parte Young* as a vehicle to circumvent the 11th amendment in this case.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (*Coeur d'Alene)*, provides a final rationale for this Court to reject application of *Ex parte Young*. As in *Couer d'Alene*, NARUC's member States have a special

sovereignty interest in ensuring their public rights of way are used by utilities to provide safe, reliable and reasonably priced local telephone service. Just as Idaho had a sovereign interest in preserving public access to its navigable waters that prevented a suit against Idaho officials under *Ex parte Young*, so too do the States have a special interest in requiring telephone companies to open access to their networks in public rights of way to competitors to ensure the public's interest in receiving the best possible telephone service at the lowest price. The Court should find Illinois' sovereign immunity remains intact - having been neither abrogated nor waived, nor bypassed pursuant to *Ex parte Young* - and vacate the decision below.

ARGUMENT

THE LIMITED EXCEPTIONS TO STATE IMMUNITY TO PRIVATE NONCONSENSUAL SUITS IN FEDERAL COURT MUST BE STRICTLY CONSTRUED AND HAVE NO APPLICATION TO THE CIRCUMSTANCES PRESENTED IN THIS PROCEEDING.

State sovereign immunity to private nonconsensual suits in federal courts is an inherent feature and vital preexisting principle of our federal constitutional structure.[4]

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[4] *Alden*, 527 U.S. at 712-13, 715 (1999); See also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (*Seminole*); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)(*Han*) and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997)(*Coeur d'Alene*). This principle "accords the States the respect owed them as members of the federation," *Alden*, 527 U.S. at 748-49, and avoids the indignity of States being

footnote continued on next page

In recognition of that structure, this Court has always strictly construed limitations on that immunity[5] finding only three general circumstances where such suits are permissible. First, Congress can abrogate the sovereign immunity of nonconsenting States if (1) it validly acts "pursuant to a constitutional provision granting Congress the power to abrogate," and (2) it "unequivocally express[es] its intent to abrogate the immunity."[6]

Second, a State may voluntarily waive its sovereign immunity from suit by private individuals in federal courts either by explicitly consenting to such suits,[7] or by accepting from Congress a gratuity that is conditioned on such a waiver.[8] However, the State must directly and affirmatively

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subjected to the "coercive process of judicial tribunals at the instance of private parties," *Seminole*, 517 U.S. at 58.

5 See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (*Atascadero*) ("The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.")

6 Since § 5 of the 14th Amendment was designed to "expand[ ] federal power at the expense of State autonomy," the Court has said it grants Congress a power of abrogation that "intrude[s] upon . . .the 11th Amendment." *Seminole*, 517 U.S. at 55, 59. See also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). The 1996 Telecommunications Act was based on the Commerce clause authority.

7 See *Atascadero*, 473 U.S. at 241; *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944); and *Smith v. Reeves*, 178 U.S. 436, 441 (1900).

8 See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686-8 (1999) (*College Savings*); *Atascadero*, 473 U.S. at 247. But "[t]he test for determining whether a State has waived its immunity. . .is a stringent one." See also *College Savings*, *Id.* at 675; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (*Edelman*).

waive its immunity in a State constitutional provision or statute that explicitly "specif[ies] the State's intention to subject itself to suit."[9] Similarly, a "gratuity" from Congress, by itself, will effect a waiver of immunity by a recipient State only if Congress "manifest[s] a clear intent" to condition the gift on the State's waiver of its immunity.[10]

Finally, to ensure the supremacy of federal law, a State's 11th Amendment sovereign immunity rights are lifted in certain cases pursuant to the *Ex parte Young* doctrine to allow federal jurisdiction over suits that seek prospective injunctive relief against a State officer alleged to be perpetrating an ongoing violation of federal law.[11]

This Court's order granting certiorari set for review three issues: (1) Is enforcement of an interconnection agreement a "determination" under 47 U.S.C. § 252 and thus reviewable in federal court under 47 U.S.C. § 252(e)(6)? (2) Does a State's participation in a federal scheme that provides that State determinations are reviewable in federal court constitute a waiver of immunity? and (3) does the *Ex parte Young* doctrine apply to negate State immunity? As discussed *infra*, the 7th Circuit decision's examination of these issues does not "indulge every reasonable presumption against" a State waiver of immunity. Instead, the opinion

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9 See *Atascadero*, 473 U.S. at 241.

10 Id. at 247; See also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

11 See *Ex parte Young*, 209 U.S. 123 (1908); See also *Alden*, 527 U.S. at 747; *Seminole*, 517 U.S. at 73-74; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Edelman*, 415 U.S. at 663-68.

relies on a series of presumptions in favor of waiver, leading inevitably to its conclusion that all three questions should be answered in the affirmative. Under the 7th Circuit's analysis, by engaging in *any* consideration of conduct under an approved agreement or statement, no matter how limited or unrelated to the prior approval, State commissions waive immunity and subject themselves or their commissioners to suit in federal court. As discussed *infra*, NARUC respectfully submits that such a result is contrary to the express language of the Act and this Court's prevailing precedent and must be reversed.

A. APPLICABLE STATUTORY CONSTRUCTION RULES REQUIRE 47 U.S.C. § 252 BE READ TO EXCLUDE FEDERAL COURT REVIEW OF STATE ENFORCEMENT DECISIONS.

The 7th Circuit finds that State orders to enforce an interconnection agreement "determination" under § 252 are themselves "determinations" and thus reviewable in federal court under § 252(e)(6). This interesting construct not only ignores the basic tenets of statutory construction, but also the express terms of the statute itself in §601, and this Court's thematic insistence that Congressional enactments that successfully negate a participating State's 11th Amendment immunity, "manifest a clear intent" to condition the gift or gratuity on the State's waiver.

This Court's basic "plain language" rule of statutory construction applies here: Where the language of the statute is plain, it is regarded as conclusive, and any inquiry as to its

meaning should ordinarily end.[12] Neither the 7th Circuit, nor the other decisions cited by the 7th Circuit address this rule. All essentially acknowledge, as they must, that the plain language of § 252(e)(6) does not expressly confer jurisdiction on federal courts to review State commission orders enforcing negotiated interconnection agreements.[13] By its own terms, that section only confers[14] jurisdiction on federal courts to review State commission "determinations" made under § 252 "to determine whether [interconnection] agreement[s] ... meet[] the requirements of section 251 and this section [252]." {Emphasis Added}

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12 *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 261 (1997); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989).

13 *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 481 (5th Cir.2000) was one of the cases cited below that expressly recognizes § 252(e)(6) can be read literally to only limit federal review of State decisions "approving or disapproving, or arbitrating, an interconnection agreement." *Id.* at 479. But it decides that "plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to. . .enforce [such] agreements." *Id.* Thus, it concludes, an enforcement action is an implied State power under § 252 and a determination reviewable in federal court. As discussed, *infra*, that finding (1) ignores the fact that the State already possesses authority to act unless preempted and (2) conflicts with Congressional instructions in § 601(c)(1) of the 1996 Act as well as the general principle that federal court jurisdiction must be found in an explicit Congressional grant.

14 NARUC's members believe strongly that *even where States are acting in a manner directed by the plain language of this section*, i.e., approving arbitrations or agreements under § 252(e)(6), that provision does not meet the standards established by this Court for a State's waiver of 11th amendment immunity or, as discussed below, create a circumstance permitting the application of the *Ex parte Young* doctrine.

Any further analysis of the statutory text to discover what "determinations" are made pursuant to § 252 are subject to two additional tenets of statutory construction: First, this Court's consistent insistence that statutes conferring jurisdiction on federal courts are to be strictly construed;[15] Second, Congress' contemporaneously enacted rule of statutory construction for § 252 and all other changes imposed by the 1996 Act found in § 601(c), titled "No implied effect", which specifies that: "This Act and the amendments of the Act shall not be construed to modify, impair, or supercede Federal, State or Local law unless expressly so provided in such Act or Amendments." See Pub.L.No. 104-104, §601(c)(1), 110 Stat. 56, 143 (codified in note following 47 U.S.C. § 152 (1996)).

A close look at § 252 suggests that the caption of the section, which states only that it covers "Procedures for negotiation, arbitration, and approval of agreements," is true

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15 See generally, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, at 377 (1994)

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, [citations omitted] which is not to be expanded by judicial decree, [citations omitted]. It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11, 1 L.Ed. 718 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction. ."

See also *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 377 (1995) ("Judicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms.")

to the text.[16] The only State "determinations" authorized deal specifically with arbitration and approval of arbitrated agreements. State enforcement authority is not mentioned.[17]

Critical to an understanding of a proper statutory analysis is an understanding of both the source of State authority and the interplay of that authority with Federal enactments. The application of canons of strict construction is particularly appropriate in the circumstances presented in this proceeding because *federal statutes cannot confer additional authority on any State agency.*[18] The State already has *sui generis* authority.[19]

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16 See *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959). (Titles cannot limit the plain meaning but can help resolve ambiguity.)

17 For *negotiated* agreements, the *only* "determination" that can be made by the State commission under § 252 is to approve or reject it.

18 Cf. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) (allowing States to place discriminatory taxes on out-of-state corporations in interstate commerce.)

19 See generally *Munn v. People of State of Illinois*, 94 U.S. 113, 124 (1876)

> "[The founding fathers] retained for the purposes of government all the powers of the British Parliament, and through their State constitutions . . . undertook to give practical effect to such . . .Subsequently . . . a part of the powers of the States . . .was granted to the [federal government]." {Emphasis Added}

See also Nowak, John E., Rotunda, Ronald D. & Young, J. Nelson, *Constitutional Law*, West Publishing St. Paul, MI (1980) at 112

> " For the purposes of federal law, State governments (or their subsidiaries) are not creatures of limited powers: they are recognized as having a general "police power"–the inherent power to protect the health, safety, welfare or morals of persons within their jurisdiction. .

footnote continued on next page

The majority of Congressional enactments either: (1) lift federal statutory restraints on *existing* State authority, or (2) preempt *existing* State authority to act. When Congress acts to restrict State authority, frequently, it will also include a provision to "reserve" certain levels of *existing* State authority.

In the 1996 Telecommunications Act, Congress raised previously imposed limits on State authority in some minor respects – and significantly limited existing authority in others. The section at the focus of this appeal, i.e., § 252 falls in the second category. That section reserves State commissions' traditional oversight of local telecommunications services with respect to the review and approval of interconnection agreements, if the State commission adheres to the Act's procedural restrictions and related FCC rules.

The touchstone for all statutory interpretation is Congressional intent. *Clearly, Section 252 must therefore be viewed as an incursion on existing State authority rather than as a grant of "new" authority.*

. [f]ederal courts test only whether a State act violates some specific check . . .contained in the federal constitution. {Emphasis Added}

Id. at 119 "[T]he federal government is one of enumerated powers and ... does not possess a general police power." A commission's authorization can take the form of State constitutional provisions or a separate State enabling statute.

This view explains the § 601(c) proscription against implying preemption in § 252, and also, why this Court has historically strictly construed federal court jurisdictional grants. If the proscriptions do not apply, to discern Congress' view of its review authority, the Courts must engage in one of two possible illogical exercises. They must try to guess the scope of "additional" authority "implied" by a Congressional statute (§ 252) that *unequivocally restricts more expansive existing State authority.* The alternative, though facially more appealing, has the same internal illogic. If we assume, *arguendo,* elements of § 252 actually reduce previous restrictions limiting State authority and free the State to exercise more jurisdiction than under previous enactments, *because § 252 also unmistakably severely restricts existing State authority*, the Courts still face an imprecise and arguably even more complex task of trying to discern what is the proper scope of "additional" authority that may be "implied" and thus subject to review. Neither exercise accords with Congress' expressed intent – as suggested by both the plain text of the Act and § 601(c).

State authority to generally handle enforcement matters predates the 1996 Act. There is no need to "imply" as the 7th Circuit's analysis does, its existence. State authority to enforce interconnection agreements does not derive from the mandatory statutory (and FCC authorized) restrictions imposed on States in § 252 that wish to approve or reject interconnection agreements. Rather, States' broader policy decisions and enforcement actions, such as the one at issue, are not dependent on the existence of the regulatory scheme in the Act at all, *but derive independently from the*

State's sui generis police powers[20] - separate from any role contemplated by the 1996 Act.

One other long time Supreme Court doctrine has application here:"[W]here a statute is susceptible of two constructions, by one of which grave . . .constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) {Emphasis Added}. In conformance with this doctrine, this Court should adopt the plain-language reading of §252(e)(6) advanced *supra* as it clearly allows the Court to avoid considering the significant 11th Amendment concerns posed by the other issues set for review in this proceeding.

Given the foregoing, State enforcement actions addressing a previously approved interconnection agreement cannot be construed as a "determination under [§ 252]" and thus are not reviewable in federal courts.[21] Moreover, even if this Court were to consider these decisions to be subject to

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20 In 1996, Congress expressly maintained the broad reservation of existing State authority in 47 U.S.C. § 152 over intrastate communications service, subject to numerous specific delegations of authority to the FCC. See also 47 U.S.C. §261(b),(c) [State commissions may enforce earlier regulations and continue to prescribe regulations which are not inconsistent with the Act]; §253 (d) [Act does not "effect" State's ability to impose competitively neutral universal service requirements]; §252(e)(3). 47 U.S.C. § 251(d)(3) (1996).

21 This is true even if one stretches the Act and this Court's precedent to assume, *arguendo* that the State commission's approval of the underlying arbitration agreement results in a constructive waiver of 11th amendment immunity.

§ 252(e)(6), that section's applicability is far from explicit, and the States cannot be understood to have voluntarily subjected themselves to its provisions.

B. States Do Not Waive Their Sovereign Immunity By Either Engaging in Enforcement Activity or Making "Determinations" Within the Meaning of § 252.

Ultimately, the second issue presented for review must turn on the issue of constructive waiver. In *Seminole Tribe of Florida v. Florida*,[22] this Court decided that Congress could not use the *Indian Gaming Regulatory Act*, enacted under the Indian Commerce Clause of the Constitution, to abrogate State immunity to private suits in federal court under the 11th Amendment. Since *Seminole*, this Court has made it clear that statutes enacted under the Commerce Clause to regulate interstate commerce, *including the Telecommunications Act of 1996,* cannot abrogate the States' 11th Amendment immunity to unconsented suits in either federal or State court.[23] Since there is no evidence, or even allegation, that the Illinois Commission expressly waived its immunity by statute or constitutional provision,

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22 See, *Seminole*, 517 U.S. at 72-73; U.S. Const., art. I, § 8, cl. 3; 25 U.S.C. § 2710(d)(7)(B).

23 See *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 635-636 (1999) (Patent and Plant Variety Protection Remedy Clarification Act enacted under Commerce and Patent Clauses did not abrogate State immunity); *Alden*, 527 U.S. 706 (1999) (Fair Labor Standards Act enacted under the Commerce Clause did not abrogate State immunity).

all arguments of waiver must focus on the constructive wavier doctrine.

However, any argument that States constructively waive their 11th Amendment immunity by merely arbitrating interconnection agreements under the Act or enforcing agreements tangentially related to the Act, is squarely contradicted by this Court's recent decision in *College Savings*, 527 U.S. 627 (1999).

In that case, the Court rejected claims that Florida may be subject to federal suit under the Lanham Act for trademark violations, holding the State had not "impliedly" or "constructively" waived its immunity from suit by its involvement in an enterprise for profit. The Supreme Court held that States must expressly waive their immunity and that "...there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *College Savings*, 527 U.S. at 680-681. Likewise, the State presence in the field of telephone regulation does not constitute a waiver. Moreover, §§ 251-2 procedures present State commissions with the untenable "choice" of either carrying out its statutory duties by regulating intrastate telephone services in accordance with federal and State directives, or opting out of regulating an area its State legislature has assigned it to regulate, in order to preserve its 11th Amendment immunity from suit. Such an option is no choice at all. See *New York v. United States*, 505 U.S. 142, 146 (1992) (offering "States a 'choice' between . . .two unconstitutionally coercive alternatives . . . lies

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outside Congress' enumerated powers").[24] As the Supreme Court stated:

> There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress' expressing unequivocally its intention that if

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[24] If Section 252 of the Act passes muster under the 11th Amendment, it fails under the 10th Amendment and the Guarantee Clause because of the coerciveness of the choice. Justice O'Connor, who dissented strenuously in *FERC v. Mississippi*, 456 U.S. 742 (1982) from the idea that States could be compelled "either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to State authority," *Id.* at 783, wrote the majority opinion in *New York v. United States*. The regulatory surrender in this case is much more onerous than that in *FERC v. Mississippi*, because that case involved State regulation of wholesale sales by competing generators, an area previously reserved to the federal government. In this case the State Commissions are coerced into surrendering their historic regulation of intrastate local telephone service to avoid unconsented federal suits by private parties. Regulation of local exchange carriers has traditionally been left within the States' police powers. Indeed, telecommunications indisputably involves a quintessential "State interest" – the provision of communication services to the citizenry at competitive rates. A State's natural imperative to continue in a *parens patria* role with respect to its citizens should not be conditioned on a waiver of vital rights. Moreover, the FCC severely undermined any voluntary aspect of the choice by stating explicitly, if they had to act because a State Commission chose not to under the Act, they would "not be bound by State laws and standards that would have applied to the State commission in such proceeding or matter." 47 C.F.R. 51.807(b). If a State Commission fails to adhere to the Act's procedural restrictions, and the FCC takes over the traditional State role, State law requirements will not receive any consideration and parties could ignore those State provisions with impunity.

> the States take certain action, it would be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an 'altogether voluntary' decision to waive its immunity. *College Savings*, 527 U.S. at 680-681.

The Hobson's choice[25] of forgoing State action in an area of traditional State regulation and waiving immunity to suit by private parties in federal court violates the sovereignty of NARUC's member State utility commissions.[26] Indeed, this is a far stronger case for State immunity than *College Savings*, where the issue was whether the State would be given immunity for actions removed from core State functions inasmuch as the State was acting as a "market participant." 527 U.S. at 681-683. In this case, the States are engaged in a core regulatory function involving an exercise of police power.[27] As the foregoing discussion

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25 Thomas Hobson was a sixteenth century English keeper of a livery stable who allowed his customers to choose the horse nearest the stable door or none at all.

26 Many State utility commissions worked effectively for years before the 1996 Act to bring the benefits of local telephone competition to their citizens without the apprehension of such suits.

27 As the Supreme Court stated in *College Savings*, "...we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed - and the voluntariness of the waiver destroyed - when what is attached to the

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clearly indicates, there is no "gift", no implied waiver, no Congressional abrogation, and no express State waiver. Therefore, for the Illinois Commission's enforcement orders to be subject to federal court review, it must fall within the *Ex parte Young* exemption. A close examination of the relevant case law shows it does not.

C. Individual Commissioners Of NARUC's Member State Utility Commissions Are Not Subject To Injunctions Under *Ex parte Young*.

Finally, NARUC's individual Commissioners are not susceptible to the third exception to immunity - injunctions for alleged violations of the Telecommunications Act under the doctrine first enunciated in *Ex parte Young*, 209 U.S. 123 (1908).[28]

This Court's decisions in *Seminole* and *Coeur d'Alene*, *supra*, "mark a significant narrowing of the scope of the *Ex parte Young* doctrine" that render it inapplicable to the current situation. This is true even assuming, *arguendo*, that

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refusal to waive is the exclusion of the State from otherwise lawful activity."527 U.S. at 687.

28 In *Ex parte Young*, a federal court enjoined a State official from bringing suit to enforce a State statute that allegedly violated the due process clause of the 14th Amendment. The Court held that when a State officer violates federal constitutional provisions, that officer has in effect been stripped of State authority - because the State could not be presumed to condone or authorize action that violates federal law - and can thus be sued as an individual.

State enforcement actions can be properly characterized as "determinations" under § 252 of the Act. Specifically, in *Seminole*, the Supreme Court held that the *Ex parte Young* exception to 11th Amendment immunity does not apply where "Congress has prescribed a detailed remedial scheme for enforcement against a State of a statutorily created right" 517 U.S. at 74. In *Seminole*, a State government's alleged failure to negotiate compacts allowing gaming on Indian reservations could not result in court injunctions pursuant to *Ex parte Young* because Congress prescribed a detailed remedial scheme in the *Indian Gaming Regulatory Act* (IGRA). *Id.* The IGRA provided for tribe-State negotiations in good faith, with a requirement that a pact be concluded in 60 days; if a pact was not concluded the parties would select a mediator who picked one compact; if the State then failed to adopt it, the Secretary of the Interior could then establish gaming regulations. *Id.* 517 U.S. at 72-74; 25 U.S.C. § 2710(d)(7)(B). Because Congress constructed a remedial scheme, this Court found no basis for concluding that Congress also intended individual State officials to be subject to federal suits. *Id.*, 517 U.S. at 74 n. 17.

Like the IGRA, the 1996 Telecommunications Act provides detailed provisions for compulsory arbitration of interconnection agreements, consisting of: (1) a 135-day initial negotiation between the incumbent local exchange carrier (LEC) and the competitive LEC, 47 U.S.C. § 252(b)(1); (2) a period of 135 days to 160 days in which a State commission may be petitioned for arbitration, 47 U.S.C. § 252(b)(4); (3) a 25-day period for responses to the petition, 47 U.S.C. § 252(b)(3); (4) a State commission decision within nine months of the initial request for

arbitration, 47 U.S.C. § 252(b)(4); (5) filing of an agreement with the State commission, which will then act between 30 and 90 days, depending upon the type of agreement, 47 U.S.C. § 252(e)(4); and, finally, (6) a judicial review of the State commission action. 47 U.S.C. § 252(e)(6). Accordingly, the *Seminole* result should also apply in this instance.

Also, the 1996 Act contains no other evidence that Congress intended to subject individual State officials to federal suits. In *Seminole*, this Court observed that the statute indicated that Congress clearly contemplated that the State would be the respondent and repeatedly referred to "the State." *Seminole*, 517 U.S. at 75. According to that decision, where a statutory scheme unmistakably "permits" a State or its agency to act, as opposed to an individual State official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Id.* 75 n.17. Thus, the *Seminole* Court determined that absent explicit Congressional authorization, Courts should not permit the use of an *Ex parte Young* action to negate a State's sovereign immunity.

In the 1996 Act, all of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and none of the provisions refer to individual State commissioners. Section 252(e)(6), the statutory provision that is central to this appeal, is entitled "Review of State Commission Actions." That heading alone implies any appeal will be filed against State Commissions – not individual commissioners. Section 252 refers forty-five times to the "State commission" with four such references contained in the subsection headings. See 47 U.S.C. §§252(b)(4)(e),

(e)(6), and (f)(2). It never refers to individual State commissioners.[29] Just as the Supreme Court decided that the remedial scheme of the IGRA precluded application of *Ex parte Young*, so too the remedial scheme of the 1996 Act, and the multiple references to State commissions, shows that Congress did not intend to apply the *Ex parte Young* doctrine to allow suit against officials of State commissions implementing the 1996 Act.

Coeur d'Alene, supra, provides a final rationale for this Court to reject application of *Ex parte Young* to the current circumstance. *Coeur d'Alene* held that the subject Indian tribe could not invoke the *Ex parte Young* exception to 11th Amendment immunity to sue individual Idaho State officials over title to certain submerged lands in the State. 517 U.S. at 287- 288. The Supreme Court held that Idaho's special sovereignty interest in the land and navigable waters within its borders required the 11th Amendment bar

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29 Suits brought under 252(e)(6) are clearly against the State as a sovereign entity. As discussed *supra*, the Act designates actions of the "State commission" as the object of federal review, not individual officials. Moreover, many State commissioners are only authorized to act as a collective entity. See, e.g., Section 350.01(5), Fla. Stat. What is challenged in such suits is the sovereign interest of the States to implement competition in the communications market pursuant to their police power with respect to the enforcement proceedings at issue. Plaintiffs have resorted to naming individual commissioners as defendants in these suits solely to invoke *Ex parte Young*. As such, they attempt to sacrifice state sovereignty to the "elementary mechanics of captions and pleadings" and "adhere to an empty formalism and .. . undermine the principle . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Coeur d'Alene* 521 U. S. at 270.

injunctions against individual Idaho officials seeking prospective injunctive relief over legal title to State land. Id. at 2040-2041. The Court emphasized that it was vital that Idaho be able to exercise its sovereignty to protect the public right to use navigable waterways. Id. at 2041-2042.

Likewise, the Illinois commission and NARUC's other member States have a special sovereignty interest in ensuring that their public rights of way are used by utilities to provide safe, reliable and reasonably priced local telephone service. Just as the State of Idaho has a sovereign interest in preserving public access to its navigable waters that prevented a suit against Idaho officials under *Ex parte Young*, so too do the States have a special interest in requiring telephone companies to open access to their networks in public rights of way to competitors to ensure the public's interest in receiving the best possible telephone service at the lowest price. This sovereign interest is particularly keen as the States labor to ensure that their citizens reap the maximum benefit of new communications technologies, such as the Internet, that are revolutionizing telephone service. *Coeur d'Alene* prevents this Court from discarding this special sovereignty interest by invoking *Ex parte Young* to allow suits against individual State utility commissioners. 521 U.S. at 287-288 [30]

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30 In *Coeur d'Alene*, Justices Kennedy and Rehnquist emphasized that the courts of Idaho would answer the Tribe's claim to State lands and waters. *Id.* at 270-272, 274-276, 287-288. If phone companies lack the remedy of a private suit against a State in federal court, that is solely the result of Congress' decision to preclude private suits against State commissions in State court. 47 U.S.C. § 252(e)(4). Given that §

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CONCLUSION

For the reasons set forth, *supra*, NARUC urges the Court to reject arguments to first find the Illinois Commerce Commissions enforcement action was a "determination" within the meaning of § 252, and/or that any of the three exemptions to State immunity from nonconsensual suit in federal courts applies.

The Court should find Illinois' sovereign immunity remains intact - having been neither abrogated nor waived, nor bypassed pursuant to *Ex parte Young*- and vacate the decision below.

252(e)(6) violates the 11th Amendment, perhaps § 252(e)(4), which is part and parcel of the same judicial review provision, should fall as well.

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IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, TERRY S. HARVILL, EDWARD C. HURLEY, RUTH K. KRETSCHMER and MARY FRANCES SQUIRES, in their official capacities as Commissioners of the Illinois Commerce Commission,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORP.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Sprint Corporation ("Sprint") submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

INTEREST OF SPRINT CORPORATION AS *AMICUS CURIAE*

Sprint, through its subsidiaries, has substantial local and long distance telephone operations throughout the United States. Sprint Communications Company L.P. ("Sprint L.P.") is a "telecommunications carrier" as defined in the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). 47 U.S.C. § 153(44). Sprint L.P. is attempting to gain access to local telephone markets as a competitive local exchange carrier ("CLEC"). Other Sprint subsidiaries are incumbent local exchange carriers ("ILECs") in numerous locations and are generally subject to the Act's pro-competitive requirements. This Court's interpretation of the judicial review provisions of the Act will affect Sprint and other CLECs and ILECs involved in ongoing interconnection proceedings before state commissions around the country.

STATEMENT OF THE CASE

The underlying litigation involved the enforcement and interpretation by the Illinois Commerce Commission of an interconnection agreement between Illinois Bell Telephone Company ("Illinois Bell") and WorldCom Technologies, Inc. ("WorldCom") that the commission approved pursuant to Section 252 of the Act. Illinois Bell filed suit in federal

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[1] Sprint has obtained written consent from all parties to file an *amicus* brief. The consent letters are annexed hereto. No counsel for a party authored the brief in whole or in part and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37(6).

district court, pursuant to Section 252(e)(6) of the Act, naming as defendants the Illinois Commerce Commission and its individual members in their official capacity (collectively, "ICC"). Illinois Bell argued that the ICC's interpretation of the interconnection agreement violated federal law.

The ICC, petitioners in this case, moved to dismiss the complaint, arguing that Section 252(e)(6) of the Act limits federal court jurisdiction to the review of state commission determinations approving or rejecting interconnection agreements between CLECs and ILECs, and does not extend to the review of subsequent decisions enforcing or interpreting the interconnection agreements. The ICC alternatively argued that it is immune from federal court jurisdiction pursuant to the Eleventh Amendment and that its participation in proceedings to arbitrate, approve, and interpret the interconnection agreement did not constitute a waiver of its immunity.

The district court denied the ICC's motion to dismiss, holding that: (i) the ICC was not immune from suit under the Eleventh Amendment; and (ii) the district court had exclusive jurisdiction under Section 252(e)(6) to review the actions of the ICC in interpreting and enforcing interconnection agreements.[2] The ICC appealed to the Seventh Circuit. The court of appeals rejected the ICC's Eleventh Amendment claim based on its prior decision in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir. 1999) ("*MCI-I*"), *modified on rehearing*, 222 F.3d 323 (7th Cir. 2000) ("*MCI-II*"), which held that the ICC waived its immunity from suit in federal court by electing to assume regulatory responsibility under the Act. *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 570 (7th Cir. 1999).

[2] The district court ultimately held that the ICC's interpretation of the interconnection agreement did not violate federal law. Ameritech appealed to the Seventh Circuit, which affirmed the district court's decision on the merits.

The Seventh Circuit also held that federal courts have jurisdiction under Section 252(e)(6) to review whether state commission orders interpreting or enforcing interconnection agreements violate federal law. *Id.* at 570-71.[3]

In their respective briefs opposing the ICC's petition for a writ of *certiorari*, Illinois Bell and WorldCom, respondents in this case, both argued that the ICC's enforcement and interpretation of the interconnection agreement could be challenged in federal court, although they disagreed as to the degree to which interpretation of interconnection agreements falls within Section 252 of the Act. The respondents were in complete agreement that the ICC was not entitled to Eleventh Amendment immunity from federal court jurisdiction under Section 252(e)(6) and that the *Ex parte Young* doctrine allowed federal court actions to proceed against individual commissioners in their official capacity.

This Court granted the petition for *certiorari* to address the following three questions:

- whether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a "determination under [section 252]" and thus reviewable in federal court under 47 U.S.C. § 252(e)(6);
- whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission

[3] The ICC filed a petition for rehearing with the Seventh Circuit. That petition was held in abeyance pending the Seventh Circuit's reconsideration of its Eleventh Amendment ruling in *MCI-I*. The Seventh Circuit subsequently issued a revised opinion in *MCI-II* reaffirming its ruling that state commissions do not have Eleventh Amendment immunity in actions brought under Section 252(e)(6) and also holding that the carriers may proceed against the individual commissioners under the *Ex parte Young* doctrine. It then denied the ICC's petition for rehearing in the instant case.

determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity; and

- whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

Sprint adopts the arguments of WorldCom and intervenor Federal Communications Commission ("FCC") that: (i) a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that expressly provides for federal court review of state commission determinations constitutes a waiver of Eleventh Amendment immunity; and (ii) an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing regulatory functions under the Act can be maintained under the *Ex parte Young* doctrine.[4]

SUMMARY OF ARGUMENT

Sprint's brief addresses a single point not addressed in the parties' briefs: whether a state can exercise regulatory authority under the Act without consenting to judicial review in federal court. This analysis may assist the Court should it hold that: (i) a state commission does not waive its immunity from suit in federal court by voluntarily assuming regulatory responsibility for implementing the Act's requirements pursuant to Section 252; and (ii) actions cannot be maintained against individual commissioners in their official capacity

[4] Sprint does not address whether a state commission's action relating to the enforcement of a previously approved Section 252 interconnection agreement is a "determination under [Section 252]" and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6).

under the *Ex parte Young* doctrine. Such a finding would raise serious due process questions about the remedial scheme prescribed by Congress under the Act and would obligate this Court to look for any reasonable construction of the statutory scheme that avoids a constitutional infirmity.

Sprint believes that a state commission cannot exercise the regulatory authority created by Congress under the Act without consenting to review of its actions in the judicial forum chosen by Congress (*viz.*, the federal district courts). This judicial review obligation is no less a part of the state commission's "responsibility" under the Act than are its other regulatory duties and functions. A state commission thus "fails to act to carry out its responsibility" under the Act, within the meaning of Section 252(e)(5), if the agency refuses to consent to federal court jurisdiction in a Section 252(e)(6) review action. In that event, Section 252(e)(5) mandates that the FCC shall preempt the state commission's regulatory authority and assume responsibility for the matter. Section 252(e)(6), in turn, provides that the FCC's actions upon preemption and any judicial review of them (*i.e.*, under the Hobbs Act) "shall be the exclusive remedies for a State commission's failure to act."

This construction of the statutory provisions is consistent with their plain language, preserves federal court review of the Act's implementation, as intended by Congress, and avoids a constitutional problem. It also respects the sovereignty of the states, by permitting them to choose—based on their own perceived interests—between maintaining immunity from suit in federal court or consenting to such review in order to exercise the regulatory powers offered to them by Congress under the Act.

ARGUMENT

I. THE TELECOMMUNICATIONS ACT OF 1996 CREATES A NEW STATUTORY REGIME OF SHARED FEDERAL AND STATE AUTHORITY.

The Act seeks to transform state-sanctioned local monopolies into fully competitive markets on a national scale. The Act fundamentally restructures local telecommunications markets by prohibiting states from enforcing laws that impede competition and by imposing various duties on ILECs to facilitate market entry. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) ("*IUB I*"). The Act is a valid exercise of Congress' constitutional authority under Article I, Section 8 of the Constitution (the "Commerce Clause") and preempts state regulation of local telecommunications to the full extent provided under the statutory scheme. *Id.* at 378 n.6 (Congress "unquestionably" has taken the regulation of local telecommunications away from the states with regard to those matters addressed by the Act.).

Under the Act, new entrants may seek to compete in the local telecommunications market by reselling an ILEC's existing services, by leasing "unbundled" elements of an ILEC's local network necessary to provide telecommunications services, or by "interconnecting" their own networks with an ILEC's network. *Id.* at 371. The Act provides a process for negotiation and, if necessary, arbitration of the terms and conditions for these arrangements, which are to be incorporated into "interconnection agreements." *Id.* at 373.[5] Each interconnection agreement

[5] When the ILEC is also a Bell Operating Company ("BOC"), the Act provides for an alternative method of competitive entry in cases where the BOC has received no requests for interconnection, so that the BOC can demonstrate compliance with the prerequisites for long distance entry set forth in Section 271 of the Act. The BOC may submit a Statement of Generally Available Terms ("SGAT") for approval by the state commission. A SGAT contains "the terms and conditions that such company

must be reviewed and approved by a regulatory agency (*i.e.*, the FCC or relevant state entity). 47 U.S.C. § 252(e)(1)-(2). The regulatory agency retains authority to enforce the agreement. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part and rev'd in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Congress could have exercised its Commerce Clause powers to preempt the states completely, under Article VI of the Constitution (the "Supremacy Clause"), from participating in this regulatory scheme. Congress instead offered the states a cooperative role in the effort, by authorizing the commission or agency traditionally responsible for local telecommunications regulation within each state ("state commission") to assume responsibility for implementing the Act's requirements. 47 U.S.C. § 252(a)-(b). Where a state commission chooses to assume that responsibility, it must follow the dictates of the Act and the FCC's implementing regulations. *IUB I*, 525 U.S. at 378 n.6 ("This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the line to which they must hew."). Congress also intended for a state commission's exercise of these new federal regulatory powers to be subject to review in federal district court, 47 U.S.C. § 252(e)(6), and expressly prohibited state court review of such actions. *Id.* § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). "[I]f the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *IUB I*, 525 U.S. at 378 n.6.

A state commission's decision to assume regulatory responsibility under this statutory scheme is voluntary.

generally offers within that State to comply with the requirements of [S]ection 251 [of the Act] and the regulations thereunder and the standards applicable under [Section 252]." 47 U.S.C. § 252(f)(1).

Congress did not purport to compel the states to participate against their will. Thus, if a state commission chooses not to carry out its regulatory responsibilities at any stage under the Act, Congress provided for federal preemption through two provisions of the Act:

- *Section 252(e)(5)* states as follows:

  COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section *in any proceeding or other matter* under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5) (emphasis added).

- *Section 252(e)(6)* further provides, in pertinent part, that:

  In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC's] actions shall be the *exclusive* remedies for a State commission's failure to act.

Id. § 252(e)(6) (emphasis added).

II. A STATE COMMISSION'S REFUSAL TO CONSENT TO FEDERAL DISTRICT COURT JURISDICTION TRIGGERS FEDERAL PREEMPTION.

As envisioned by Congress, a state commission plays a critical role when it voluntarily assumes the regulatory responsibilities created under the Act. The state commission is responsible for resolving through arbitration any disputes among the carriers—including the rates, prices, and other

terms governing interconnection agreements. *Id.* § 252(c). The state commission is also responsible for approving and rejecting interconnection agreements based on the criteria set forth in the Act. *Id.* § 252(e)(1)-(2). Unless this Court rules otherwise, the state commission retains responsibility under Section 252 for enforcing the interconnection agreements. Many of the issues raised in the various proceedings are complex, fact-specific, and require the technical expertise of the state commission. *See, e.g., U S W. Communications, Inc. v. Hix*, 986 F. Supp. 13, 16-17 (D. Colo. 1997).

It is untenable that a state commission would have the right to assume the regulatory authority created by Congress under the Act without being amenable to federal judicial review of its discharge of that authority. Indeed, in the majority of Section 252(e)(6) cases to date, federal district courts have found one or more determinations by state commissions to be in violation of the Act or the FCC's implementing rules and have remanded to the state commissions for remediation. *E.g., Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 252 (D. Del. 2000); *AT&T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 122 F. Supp. 2d 1305, 1317 (N.D. Fla. 2000).[6]

Sprint joins the arguments of the respondents that the doctrines of waiver and *Ex parte Young* should apply to permit federal district court review of state commission actions. Were this Court nonetheless to find that state commissions are immune from federal suit under the

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[6] The type of administrative review made by the federal district courts in these Section 252(e)(6) cases is consistent both with the statutory language, which charges the courts with determining "whether the agreement or [SGAT] meets the requirements of section[s] 251 and [252]," and the traditional role of federal courts in reviewing agency action. *See Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.").

Eleventh Amendment, Section 252(e)(4)'s proscription of state court review of state commission actions approving or rejecting interconnection agreements could lead to the untenable result of no judicial review of state commission decisions made pursuant to the Act. In that case, well-established canons of statutory construction would require this Court to provide any reasonable construction of the statutory scheme that avoids such a constitutional problem. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (federal courts are required to give a statute any reasonable construction that would avoid a serious constitutional problem); *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (same).[7] The Court need not strain to satisfy that mandate here.

A. The Plain Language Of Section 252(e)(5) Requires Preemption.

Section 252(e)(5), by its plain language, requires the FCC to preempt a state commission's "*jurisdiction*" if the state commission "*fails to act to carry out its responsibility* under this section *in any proceeding* or other matter *under this section* . . . ." 47 U.S.C. § 252(e)(5) (emphasis added). The plain meaning of these statutory terms supports the conclusion that preemption would be triggered whenever a state commission fails to consent to federal district court review.

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[7] The state petitioners have argued that Section 252(e)(4) does not prevent a state court from reviewing state commission decisions enforcing or interpreting previously approved interconnection agreements. ICC Pet'r Br. at 21. That issue is not presently before the Court. Even so, the plain language of Section 252(e)(4) prevents a state court from reviewing state commission decisions approving or rejecting interconnection agreements. A finding by this Court that state commissions can assert Eleventh Amendment immunity from suit under Section 252(e)(6) would thus render approval–or rejection determinations unreviewable and constitutionally problematic.

The term "*jurisdiction*" means "the legal power or authority to hear and decide cases; the power of executing the laws and administering justice." Webster's New Twentieth Century Dictionary Unabridged 993 (2d ed. 1979) ("Webster's Unabridged").[8] Preemption of a state commission's "jurisdiction" of an interconnection proceeding or matter removes the agency's regulatory authority under the Act and transfers that authority to the FCC.

The terms "*any proceeding . . . under [Section 252]*" are broad and unqualified. They necessarily encompass the federal district court review action contemplated in Section 252(e)(6). *See id.* at 1434 (defining "proceeding" as "legal action [or] the taking of legal action").[9]

The remaining question is whether a state commission's refusal to consent to federal district court review constitutes a "failure" by the state commission "*to carry out its responsibility*" under Section 252. The words "carry out" mean "to bring to a conclusion." Webster's II New Riverside University Dictionary 233 (1988) ("Webster's II"). They connote a process of action, and not simply a decision whether or not "to act." The term "responsibility," in turn, is generally defined as "the condition, quality, fact or instance of being responsible, answerable, accountable, or liable." Webster's Unabridged at 1543.[10] "Responsibility" thus

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[8] *See* Webster's II New Riverside University Dictionary 659 (1988) ("the right or power to interpret and apply the law"); American Heritage Dictionary of the English Language 711 (1981) ("American Heritage") (same).

[9] *See also* Webster's II at 938 ("litigation [or] the act of instituting or conducting litigation"); Black's Law Dictionary 1083 (5th ed. 1979) ("an act which is done by the authority or direction of the court, agency or tribunal").

[10] *See* American Heritage at 1108 ("a thing or person that one is answerable for; a duty, obligation or burden"). *See also* Webster's New Collegiate Dictionary 979 (1981) ("moral, legal or mental account-

connotes not only the authority to act but the corresponding duty to be accountable or answerable for one's actions. The very purpose of the Section 252(e)(6) judicial review proceeding is to determine whether the state commission has acted in accordance with federal law. That judicial review proceeding is as much a part of the process contemplated by Congress under Section 252 as the initiation of negotiations and arbitration. A state commission cannot "carry out" its "responsibility" under the Act without bringing that process to conclusion. Its failure to do so is no different in principle from a failure to complete an arbitration once begun.

The plain meaning of these statutory terms, therefore, fully supports the proposition that a state commission's refusal to be held judicially accountable for its exercise of the regulatory powers created by Congress, in the federal forum chosen by Congress, constitutes a failure by the state commission "to carry out its responsibility" in a "proceeding" under Section 252.

B. The Statutory Context And Scheme Further Support Preemption.

The context in which Congress used these statutory terms further supports preemption. Our system of government requires that an executive agency charged with regulatory authority by a legislature be accountable to the judiciary for the exercise of that authority. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . . ."). This judicial review obligation is no less a part of the agency's "responsibility" than are its other regulatory duties and functions. Congress fashioned the remedial provisions of

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ability"); Black's Law at 1179 ("the state of being answerable for an obligation, and involves judgment, skill, ability and capacity").

Section 252(e)(5) and (e)(6) with these fundamental precepts in mind. The statutory terms used by Congress should be interpreted in context to ensure that meaningful federal judicial review of the Act's implementation is preserved.

Federal preemption is also a proper consequence, within the Act's statutory scheme, for a state commission's refusal to consent to review in federal district court. Congress could have preempted the states completely and assigned responsibility for the Act's implementation solely to the FCC. Instead, Congress offered the states a cooperative role in implementing the Act. The state commission's regulatory authority springs from the Act, but the decision to assume that responsibility is voluntary. *Michigan Bell Tel. Co v. Climax Tel. Co.*, 186 F.3d 726, 732 (6th Cir. 1999). A state commission may choose at the outset to decline Congress' invitation.[11] Alternatively, a state commission may decline to participate—by decision (such as resource allocation) or mere inaction—"in any proceeding or other matter" that arises under the Act, whether it be at the mediation, arbitration, or enforcement stage. In each case and at each stage, the consequence prescribed in Section 252(e)(5) is federal preemption. Section 252(e)(6), in turn, makes preemption the "exclusive" remedy for a state's failure to carry out its regulatory responsibilities.

The same result should apply where a state commission refuses to consent to federal district court review under Section 252(e)(6). Preemption would preserve state sovereignty. Each state could weigh its own interests in either asserting Eleventh Amendment immunity (thereby allowing preemption by the FCC) or accepting federal court review as

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[11] The ICC's argument that its participation in the regulatory scheme is not voluntary because it is obligated under state law to carry out its regulatory duties is unpersuasive. To the extent there is an irreconcilable conflict between the requirements of state law and a provision of the Act, the state law is preempted. *See, e.g., IUB I*, 525 U.S. at 378 n.6.

a condition to exercising the regulatory authority offered by Congress under the Act. *See Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 284 (1906) (states can consent to federal court jurisdiction). *Cf. FERC v. Mississippi*, 456 U.S. 742, 767 (1982) (Congress can enact statutes that establish federal requirements for continued state activity in an otherwise preemptible field.); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (Congress has constitutional authority to enact statutes that set federal minimum standards which a state may either implement itself or else yield to a federally administered regulatory program.). Most state commissions could reasonably be expected to make that determination at the outset of an interconnection proceeding. Where a state commission decides to "opt out" on the basis of sovereign immunity, preemption under Section 252(e)(5) would work in the same manner as where a state commission chooses not to participate in the Act's regulatory regime for other reasons (*e.g.*, resource allocation).

Preemption under Section 252(e)(5) would also ensure federal court review of the Act's implementation, as intended by Congress. Section 252(e)(5) decisions are fully reviewable by federal courts of appeals under the Hobbs Act, 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1). *In re Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, 2001 FCC LEXIS 414, at *11 (¶ 15) (Jan. 19, 2001) ("*Section 252(e)(5) Procedures*") ("We do not believe Congress intended for judicial review of final Commission orders issued pursuant to section 252(e)(5) to deviate from [the Hobbs Act]."). Circuit court review of final FCC orders issued pursuant to Section 252(e)(5) would be "consistent with the Act's goal of uniform interpretation of federal law" and would preserve the Act from constitutional infirmity. *Id.*

Finally, the FCC has taken several steps that have made it more practical for the agency to fulfill the state commissions'

role in cases where preemption is necessary. Recently, the FCC revised and expanded its procedures for proceedings conducted pursuant to Section 252(e)(5). *Id.* at *12 (¶ 16); *In re Procedures Established for Arbitration of Interconnection Agreements between Verizon and AT&T, Cox, and WorldCom*, 16 F.C.C.R. 3957 (2001).[12] These procedures allow for the consolidation of Section 252(e)(5) proceedings "to reduce administrative burdens on the parties and the Commission." *Section 252(e)(5) Procedures*, 2001 FCC LEXIS 414, at *12 (¶ 16). In addition, the FCC has reserved "the option of retaining an outside arbitrator" to conduct the initial arbitration proceedings. *Id.* at *7 (¶ 10). The FCC has thus taken steps to minimize the added burdens and demands that preemption places on the FCC and its staff.

C. The Relevant FCC Regulations Support Preemption.

The FCC's *Local Competition Order*—issued six months after the Act's passage—included "interim procedures" implementing Section 252(e)(5) that addressed matters that were sure to arise during the earliest stages of the new regime. The FCC's original "preemption" regulations thus focused on instances where a state commission failed to respond within a reasonable time to a request for mediation or arbitration or failed to complete an arbitration within the statutory time limits. 47 C.F.R. § 51.801(b). The FCC expressly noted that these regulations were only intended as "minimum, interim procedures [which] will allow the Commission to learn from the initial experiences and gain a better understanding of what types of situations may arise that require Commission action." *In re Implementation of the*

[12] In Sprint's experience, these procedures are similar to the proceedings that many state commissions have utilized in conducting arbitrations pursuant to Section 252, including the use of a status conference, discovery, evidentiary submissions, and an arbitration hearing. *Section 252(e)(5) Procedures*, 2001 FCC LEXIS 414, at *8-*12.

Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15,499, 16,128 (¶ 1284) (1996).

The FCC's subsequent experience has led the agency to expand its interpretation of the circumstances that warrant preemption under Section 252(e)(5). Proceedings involving the Virginia State Corporation Commission (the "Virginia Commission") provide a useful illustration. Two years ago, the FCC declined to preempt the jurisdiction of the Virginia Commission in an interconnection arbitration proceeding, in part on the ground that the Virginia Commission's determination was subject to judicial review under Section 252(e)(6). *Global NAPs S. Inc. Pet. for Preemption of Jurisdiction of the Va. State Corp. Comm'n Regarding Interconnection Dispute with Bell Atl.-Va., Inc.*, 15 F.C.C.R. 23,318, 23,318, 23,327 (¶¶ 1, 20) (1999). Thus, the FCC concluded, the complaining party was "not left without a remedy" by the FCC's refusal to preempt under Section 252(e)(5).

Last year, several new entrants petitioned the Virginia Commission to arbitrate interconnection agreements with an ILEC. The Virginia Commission refused to arbitrate the interconnection agreements out of concern that its participation in the Act's regulatory process would waive Virginia's sovereign immunity. *See In re Petition of WorldCom, Inc. for Preemption of Jurisdiction*, 16 F.C.C.R. 6224 (2001); *In re AT&T Communications of Va., Inc. for Preemption of Jurisdiction*, 16 F.C.C.R. 2326 (2001) (same). This concern stemmed from a federal district court decision holding that the Virginia Commission had waived its immunity by electing to arbitrate interconnection disputes under the Act. *GTE S., Inc. v. Morrison*, No. 3:97CV493, Order at 4-5 (E.D. Va. Nov. 7, 1997). The Virginia Commission reasoned that it had no authority to waive the state's sovereign immunity and thus would "'not take any action in this matter that may subject the Commonwealth to federal suit.'" *Petition of WorldCom, Inc. for Preemption of*

Jurisdiction, 16 F.C.C.R. at 6227 (¶ 4) (citation omitted). Instead, the Virginia Commission offered to arbitrate the interconnection dispute solely pursuant to the requirements of state law.

The FCC held that the Virginia Commission's refusal to arbitrate under Section 252 was a "failure to act." The FCC thus preempted the jurisdiction of the Virginia Commission, pursuant to Section 252(e)(5). As the FCC explained:

> Under the scheme established by the 1996 Act, upon receipt of a section 252(b)(1) arbitration petition, "'the State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement [section 252(c)'s standards for arbitration] upon the parties.'" Section 252(c), in turn, requires the state commission to ensure that its resolution of the outstanding arbitration issues meets "'the requirements of section 251,'" including this Commission's implementing rules as well as the pricing standards set forth in the Act. Thus, by insisting upon arbitration pursuant to state law rather than the requirements of the Act, we find that the Virginia Commission has failed to act to carry out its responsibilities under section 252.

Id. at 6227 (¶ 5) (citations omitted).

On two other occasions, the FCC preempted the Virginia Commission for refusing a petition to enforce and interpret an interconnection agreement. *In re Starpower Communications for Preemption of Jurisdiction*, 15 F.C.C.R. 11,277 (2000); *In re Petition of Cox Va. Telecom for Preemption of Jurisdiction*, 16 F.C.C.R. 2321 (2001). In both matters, a new entrant petitioned the Virginia Commission for an interpretation of its interconnection agreement after the ILEC refused to pay reciprocal compensation for traffic delivered to internet service providers. The Virginia Commission refused to accept either petition and invited the parties to request the FCC to adjudicate the dispute.

In response to the Virginia Commission's invitation, the FCC concluded that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements [are] within the states' 'responsibility' under section 252." *In re Starpower Communications for Preemption of Jurisdiction*, 15 F.C.C.R. at 11,279 (¶ 6). The FCC noted that its existing preemption regulations only addressed a state's failure to act to arbitrate or mediate a dispute, explaining:

> [47 C.F.R. § 51.801(b)] does not consider the Commission's Section 252 responsibilities in the context of a state's "'failure to act'" with respect to its other Section 252 obligations. In adopting those rules, however, the Commission did not consider whether a state commission could "'fail to act'" in the context of a subsequent proceeding to interpret or enforce an existing interconnection agreement. In this proceeding, we apply Section 252(e)(5) for the first time to matters outside the scope of mediation and arbitration.

Id. at 11,279 (¶ 5). The FCC then expanded its interpretation of Section 252(e)(5)'s preemption provision, holding that:

> Because the [Virginia Commission] explicitly declined to take any action with respect to Starpower's petitions . . ., *we are compelled to conclude that the Virginia Commission "'failed to act to carry out its responsibility'" under Section 252.* Accordingly, the Act requires us in these unique circumstances to assume the jurisdiction of the Virginia Commission and resolve the outstanding interconnection disputes.

Id. at 11,280 (¶ 7) (emphasis added).

The FCC's expanded interpretation of Section 252(e)(5) requires preemption whether the state commission's "failure to act" occurs at the outset of an interconnection arbitration proceeding or at the enforcement stage, which may arise months or years after the interconnection agreement has been approved. The federal judicial review proceeding contemplated in Section 252(e)(6) falls in the middle of these two stages of the process. Preemption would thus be appropriate where, as here, a state commission has already conducted arbitration proceedings and approved an interconnection agreement but "explicitly declined" to submit to federal court review. Preemption would preserve the underlying efforts of the carriers and the state commission in obtaining an interconnection agreement, subject to the FCC's review of any disputed terms and conditions for compliance with the Act. It would also ensure that private parties are not left without a judicial remedy due to a state commission's failure to carry out its regulatory responsibilities under Section 252.[13]

Finally, although Sprint believes that the FCC's expanded interpretation of Section 252(e)(5) supports preemption here, any ambiguity on that point would not override this Court's independent obligation to construe the statute in any reasonable manner that avoids a constitutional problem. *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 604-05 (D.C. Cir. 1995) (rejecting FEC's narrow definition of "members" that raised First Amendment problems and adopting instead a broader, plain meaning of "members" that avoided the constitutional problem). That judicial obligation transcends the interpretive authority of the FCC and suspends *Chevron* deference. *See Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991) (within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions); *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (same). *See also Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (*Chevron* deference not afforded to FCC order that created a potential Fifth Amendment problem).

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[13] As a practical matter, it is unlikely that a state commission would proceed to these later stages in future cases without consenting to federal suit, given the prospect of preemption under Section 252(e)(5).

CONCLUSION

For the foregoing reasons, Sprint respectfully requests that should this Court conclude that a state commission may properly assert Eleventh Amendment immunity, the proper remedy is for the FCC to preempt the proceedings pursuant to Section 252(e)(5).

Respectfully submitted,

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Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* NOW Legal Defense and Education Fund

IN SUPPORT OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., et al.

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INTEREST OF *AMICUS CURIAE*

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights.[1] Major goals of NOW Legal Defense include ensuring full compliance with federal civil rights laws, including by state government entities, and preserving the legislative authority of Congress to prevent discrimination in the context of federal programs. In support of these goals, NOW Legal Defense has frequently appeared as counsel and as amicus before this Court. *See, e.g., Board of Trustees of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356 (2001); *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001); *United States* v. *Morrison*, 529 U.S. 598 (2000); *Reno* v. *Condon*, 528 U.S. 141 (2000). NOW Legal Defense has also established a Project on Federalism to further these goals. Inasmuch as this case concerns a state's amenability to suit in federal court to ensure compliance with federal law in connection with the state's participation in a federal statutory scheme, it is relevant to these goals. Petitioners' efforts in this case to narrow the circumstances in which courts will find (a) that a state waived its sovereign immunity and (b) that an *Ex parte Young* suit is available are harmful to NOW Legal Defense's interests given the increasing importance of Eleventh Amendment waiver and the *Ex parte Young* doctrine in civil rights litigation and enforcement of federal rights.

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[1] All parties in this matter have consented to the filing of this *Amicus Curiae* brief, as evidenced by letters of consent filed with the Clerk. NOW Legal Defense is not related in any way to any party in this case, and no party or its counsel has authored any part of NOW Legal Defense's brief. No person or entity other than NOW Legal Defense and its counsel has made any monetary contribution to the preparation of this brief.

SUMMARY OF ARGUMENT

1. By participating in the regulatory scheme set forth in the Telecommunications Act of 1996, the Illinois Commerce Commission has accepted a grant of regulatory authority it would not otherwise possess. Because that acceptance was clearly conditioned on federal court review, the state agency has expressed its unequivocal consent to be sued in federal court. Petitioners' suggestion that there can be no such waiver by conduct, no matter how manifest, is inconsistent with precedent, logic and law. *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), explicitly left standing the possibility that a state could objectively manifest its waiver of sovereign immunity by participating in a federal-state cooperative scheme expressly conditioned upon such waiver. Petitioners' proposed extension of *College Savings* would choke off this possibility, and with it the ease of implementation of cooperative federalism programs. By creating an additional barrier to the implementation of such programs, Petitioners would have the Court force the hand of Congress to the total preemption of the very fields that Petitioners wish to occupy.

2. The doctrine of *Ex parte Young* ensures that state officials conform their acts to federal law. It also guarantees federal court interpretation and enforcement of federal law and fosters uniformity in the application of federal law, ensuring this Court's ultimate ability to decide issues of federal law. Over the past century the Court has developed the *Young* doctrine so that the doctrine represents a balance between the objectives of federal supremacy and state sovereign immunity. Petitioners would muddy this long-standing doctrine with ill-advised new preconditions. They would upset the delicate balance *Young* represents by superimposing a standardless new balancing test to weigh federal against state interests. They would subvert nearly 100 years of *Young* jurisprudence by requiring Congress specifically to authorize *Young* suits under each new statutory

or regulatory scheme it passes. They would also import from the common law doctrines of immunity a new and ill-fitting requirement that *Young* suits be brought only with respect to actions outside the scope of the state official's valid authority. None of these proposed embellishments represents an improvement; none serves the interests *Young* was intended to protect; and none is more faithful to the delicate Constitutional balancing act than is the *Young* doctrine. The Court should reject them.

ARGUMENT

I. BY ACCEPTING A GRANT OF REGULATORY AUTHORITY THAT IT WOULD NOT OTHERWISE POSSESS, ILLINOIS HAS UNEQUIVOCALLY EXPRESSED ITS CONSENT TO SUIT

Congress may condition the grant of a federal benefit on a state's waiver of its sovereign immunity. When a state accepts that benefit, it accepts the conditions associated with the benefit and unmistakably manifests its intent to waive its sovereign immunity. Despite this long-standing principle, essential to federal and state cooperation, Petitioners urge this Court to find that a state may not demonstrate its consent to suit through such conduct, but rather must otherwise clearly state that consent. (Brief for the Petitioners at 32-40.)[2] That is not the law, even after *College Savings*.

Congress may, consistent with the Constitution, impose conditions on the states in exchange for receipt of federal benefits. Thus, pursuant to the Spending Power, Congress may

[2] Specifically, Petitioners claim that "a State must independently speak with the same clarity in waiving its sovereign immunity as is required of Congress in the asking" (Pet. Br. at 32), and that "the Court has categorically rejected constructive or implied waivers by conduct." *Id.* at 33.

condition the receipt of federal funds on the states' agreement to "tak[e] certain actions that Congress could not require them to take." *College Savings*, 527 U.S. at 686. *See also South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) ("Incident to [the Spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning the receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'") (citation omitted); *New York* v. *United States*, 505 U.S. 144, 167 (1992) ("[w]here the recipient of federal funds is a State . . . the conditions attached to the funds by Congress may influence a State's legislative choices") (citations omitted); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*") ("Congress may fix the terms on which it shall disburse federal money to the States") (citations omitted).

Similarly, "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the power to "offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York* v. *United States*, 505 U.S. 144, 167 (1992); *see Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981) (holding that Congress could give states choice between participating in administration of federal Surface Mining Act or being pre-empted entirely from the field).

Among the conditions that Congress may permissibly impose on the grant of a federal benefit is that a state waive its sovereign immunity in exchange for receipt of that benefit. *See Alden* v. *Maine*, 527 U.S. 706, 755 (1999) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits."); *College Savings*, 527 U.S. at 686 (citing *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)).

When a state accepts a federal benefit to which Congress has attached conditions, the state expresses its consent to be bound by those conditions. Thus, where Congress has conditioned a grant of federal funds on a State's taking certain actions, the State's "acceptance of those funds entails an agreement to the actions." *College Savings*, 527 U.S. at 686 (citing *Dole*, 483 U.S. at 206). And where a state accepts a federal benefit conditioned on its waiver of sovereign immunity in either the spending or the regulatory context, it objectively manifests its intent to waive its immunity by participating in the federal scheme. *E.g., Petty*, 359 U.S. at 281 (Congress conditioned approval of interstate compact on waiver of state sovereign immunity). So long as Congress makes clear its intent to condition the benefit on states' waiver of their sovereign immunity, states may "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst I*, 451 U.S. at 17. A state that chooses to accept the benefit has clearly and knowingly waived its sovereign immunity. No additional statement is required.

This principle is illustrated in *Petty*. There, the federal government approved an interstate compact that created a bi-state bridge commission, inserting a proviso that the commission was amenable to suit in federal court. *See Petty*, 359 U.S. at 281-82. In subsequent tort litigation brought by a private plaintiff, the Court held that the states manifested their consent to suit by accepting and acting under the compact with the proviso. It noted: "if there be doubt as to the meaning of the sue-and-be sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition attached by Congress is accepted and acted upon by the two States." *Id.* at 282. In other words, the states' conduct in accepting the congressional benefit conditioned on their consent to suit in federal court objectively manifested their waiver of sovereign immunity.

Petitioners' suggestion that a state's acceptance of a benefit from Congress conditioned on a waiver of sovereign immunity is not sufficient to effectuate that waiver is contrary not only to precedent but also to logic and basic principles of law. Black-letter contract law makes no distinction between forms of acceptance — written, oral, or by conduct — so long as the offeree's expression constitutes an objective manifestation of assent. *See* Restatement (Second) Contracts § 19, cmt. a (1979) ("Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise."); *id.* § 4 ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."); *id.* § 30(2) ("Unless otherwise indicated by the language of the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.") That the state's waiver is demonstrated by its conduct does not render its waiver "constructive" or unintentional.[3]

Courts routinely make reference to the language and learning of contract law in the waiver context. For example, in *Pennhurst I*, this Court explained: "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms

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[3] Of course, contract law recognizes limited circumstances in which one may not infer from a party's acceptance of an agreement consent to all the terms of that agreement. For instance, where the contract language is ambiguous, the non-drafting party may be said not to have consented to the ambiguously-worded obligations in the contract. *See* E.A. Farnsworth, Farnsworth on Contracts § 3.27 (2d ed. 1998); Restatement (Second) Contracts § 33. That circumstance is not present here. Since Congress must clearly express its intent to subject states to suit in connection with their participation in the federal regulatory scheme, *see Pennhurst I*, 451 U.S. at 17, there is no concern that a state will be unaware of its obligation to waive its sovereign immunity.

of the 'contract.'" 451 U.S. at 17 (citations omitted). Similarly, in *Litman* v. *George Mason University,* 186 F.3d 544 (4th Cir. 1999), decided after *College Savings*, the court held that states waived their sovereign immunity when they received federal funds pursuant to Title IX: "Because of the mutuality required in a contractual relationship of this type—the federal grant in exchange for state agreement to attached conditions—the legitimacy of the attached conditions rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 552 (citations omitted).

Contrary to Petitioners' contention, *College Savings* does not support the proposition that a state's participation in a federal regulatory scheme conditioned on a waiver of sovereign immunity is insufficient to show its consent to suit. While *College Savings* found that a state does not "constructively waive" its sovereign immunity merely by engaging in "otherwise permissible activity" which happens to be subject to federal regulation, *College Savings*, 527 U.S. at 687, it explicitly reaffirmed the principle that a state can manifest its acceptance of waiver through conduct, particularly when that course of conduct would not have been available to the state absent the grant of federal benefits. *Id.* at 686.

Petitioners now urge the Court to expand *College Savings* to embrace the radical new proposition that unless the state's waiver is specifically authorized — by "clear statement of intent" and not by conduct, no matter how manifest — then the waiver is merely "constructive" and therefore invalid. (Pet. Br. at 29.) There is nothing "constructive" or "implied" where a state's conduct objectively manifests its intent to waive sovereign immunity. The Court should reject such an unjustified extension of *College Savings*. *College Savings* itself rejected this very position by acknowledging the continuing vitality of both *Petty* and *Dole*. *See College Savings,* 527 U.S. at 686-87; *see also Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 397 (1998) (Kennedy, J., concurring)

(noting that consent to removal of action from state to federal court constitutes waiver of sovereign immunity "[i]f the States know or have reason to expect that removal will constitute a waiver").

If adopted, the extension of *College Savings* that Petitioners advance — requiring a clear statement of consent to waive sovereign immunity above and beyond a state's agreement to participate in a legislative scheme or accept a federal benefit so conditioned — would hinder Congress' efforts to engage in cooperative programs with, or provide benefits to, the states. Such a requirement would discourage Congress from seeking to cooperate with the states because there would be uncertainty as to whether a legislative scheme will in fact be able to carry out the federal objectives it was drafted to address. In addition, such a requirement would create additional hurdles for the implementation of a cooperative scheme, as it would require a state, before receiving the benefits of a federal scheme, to take actions in addition to their participation in the federal scheme.

This Court has repeatedly acknowledged the benefits and constitutionality of programs of "cooperative federalism," in which the federal and state governments operate as partners, "animated by a shared objective." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (national pollutant discharge elimination system); *see New York*, 505 U.S. at 167-68 (low-level radioactive waste policy); *FERC* v. *Mississippi*, 456 U.S. 742, 765-66 & n.29 (1982) (public utility regulatory policies); *Hodel*, 452 U.S. at 288-89 (surface mining control and reclamation).. Such programs address national issues while at the same time preserving the maximum degree of state autonomy. The irony of Petitioners' position is that cooperative legislation (such as the Telecommunications Act) that gives states the opportunity to participate as deputy regulators is designed precisely to avoid the even greater affront of pre-empting the states from the legislated field. *See FERC*, 456 U.S. at 766 n.29 ("Certainly, it

is a curious type of federalism that encourages Congress to pre-empt a field entirely, when its preference is to let the States retain the primary regulatory role."). Petitioners' proposed extension of *College Savings* would perversely destroy Congress's incentive to work with the states, driving Congress to dislodge the states from anything but an interstitial regulatory role in the very fields that Petitioners wish to occupy.[4]

In sum, consistent with well known and clearly defined principles of law, a state may express its waiver of sovereign immunity by conduct that objectively manifests consent to suit in federal court, such as the acceptance of a grant of federal funds or regulatory authority that the state would not otherwise possess.

II. STATE OFFICIALS IN THE POSITION OF THE INDIVIDUAL ICC COMMISSIONERS HERE ARE SUBJECT TO SUIT UNDER *EX PARTE YOUNG*

In a further effort to insulate themselves from enforcement of their obligation to follow federal law in federal court, Petitioners assert that they are not amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Petitioners seek to inject new and extraneous considerations, supposedly grounded in the Eleventh Amendment, into the determination as to whether a *Young* suit can proceed. The Court should reject Petitioners' invitation to alter the *Young* doctrine and limit the availability of *Young* suits. Such suits are indispensable to ensuring conformity with the supreme law of the land and to ensuring that federal courts, including the Supreme Court, have the opportunity to interpret and enforce federal law.

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[4] While these considerations would not be sufficient to enable Congress to apply *unconstitutional* legislation to the states, there is no contention here that the Telecommunications Act is unconstitutional.

The doctrine of *Ex parte Young* provides that the Eleventh Amendment does not bar an action by a private party in federal court seeking prospective injunctive relief against state officials to bring their conduct in conformity with the Constitution or laws of the United States. *See Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276-77 (1997); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). "Rather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court." *Puerto Rico Aqueduct and Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The *Young* doctrine is an established cornerstone of federal law — regarded by some commentators as one of the three most important decisions ever issued by the Supreme Court[5] — and remains an essential part of our constitutional system. *See, e.g., Coeur d'Alene*, 521 U.S. at 269. The doctrine is grounded in the Supremacy Clause of the U.S. Constitution. It ensures that federal law is adhered to, "anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., Art. VI.[6] The *Young* doctrine

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[5] *See, e.g.*, Erwin Chemerinsky, *Federal Jurisdiction* § 7.5.1 (3rd ed. 1999) (citation omitted); 17 Charles A. Wright *et al.*, *Federal Practice & Procedure* § 4231 & n.3 (1988) (*citing Marbury* v. *Madison*, *Martin* v. *Hunter's Lessee*, and *Ex parte Young*).

[6] In their Petition for Writ of Certiorari, Petitioners assert the meritless claim that the *Ex parte Young* doctrine permits actions for the enforcement of only the Constitution, and not the laws of the United States. (*See* Pet. Cert. at 23-27.). This is simply wrong, as Petitioners apparently concede in dropping this assertion from their principal brief. The Supremacy Clause, of course, does not distinguish between the Constitution and laws of the United States; both are supreme. As the Court noted in *Coeur d'Alene*, under *Ex parte Young* "Article III courts [have] the special obligation to ensure *the supremacy of federal statutory and constitutional law*." 521 U.S. at 270 (emphasis added); *see also Bd. of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 121 S. Ct.

permits the federal courts to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) ("*Pennhurst II*") (quoting *Ex parte Young*, 209 U.S. at 160); *see also Alden*, 527 U.S. at 757 (*Young* provides "ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause.") (citation omitted); *Green*, 474 U.S. at 68 (1985) ("[R]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). The availability of prospective relief of the sort awarded in *Ex parte Young* "gives life to the Supremacy Clause." *Id.*

The *Young* doctrine also vindicates "the importance of having federal courts open to enforce and interpret federal rights." *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring). The availability of a federal forum to determine federal rights is crucial to uniformity in the interpretation and application of federal law. *See id.* Federal courts are peculiarly competent to prevent ongoing violations of federal law.[7] Imposing undue limitations on the availability of *Young* suits may foreclose the possibility that important questions of federal

955, 968 n.9 (2001) (noting that private individuals can bring *Ex parte Young* actions to enforce the Americans with Disabilities Act); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 & n.14 (1983) (applying *Ex parte Young* to enforce the federal ERISA statute's supremacy over certain provisions of the State of New York's Human Rights Law); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 & n.6 (applying *Ex parte Young* to enforce the supremacy of the Federal Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221, *et seq.*, over portions of the State of Washington's Tanker Law).

[7] Indeed, federal courts have a "responsibility . . . to vindicate . . . controlling federal law." *Coeur d'Alene*, 521 U.S. at 313 (Souter, J., dissenting). Indeed, federal courts have a "strict duty" (although not absolute) to exercise jurisdiction where jurisdiction obtains. *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citations omitted).

law will ever reach a federal court, including the Supreme Court.[8]

Although the *Young* doctrine "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law," *Puerto Rico Aqueduct*, 506 U.S. at 146, the limitations Petitioners advocate would enable state officials to do just that. Because *Young* actions are often the only mechanism available, consistent with the Eleventh Amendment, to enforce conformity with federal law, each such limitation increases the number of circumstances in which state officials can effectively disregard federal law. Such a result would be repugnant to the Supremacy Clause and to our system of federalism.

A. *Ex Parte Young* Is A Two-Part Test, Not A Balancing Test

The availability of a *Young* action depends on a simple two-part test: a citizen of a state may seek redress in federal court against a state official, even if the State itself is immune from suit under the Eleventh Amendment, when: (1) the plaintiff alleges an ongoing violation of federal law, and (2) the relief sought is prospective rather than retrospective. *See, e.g.*, *Puerto Rico Aqueduct*, 506 U.S. at 146; *Pennhurst II*, 465 U.S. at 102-03. These two criteria — officers acting in violation of federal law, and the seeking of prospective relief to address an ongoing violation — constitute the *Young* analysis. *See Coeur d'Alene*, 521 U.S. at 288 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); *see also id.* at 298-299 (Souter, J., joined by Stevens, Ginsburg,

[8] For example, if there were no effective mechanism for federal review of issues of federal law adjudicated by state regulatory authorities under the Telecommunications Act, this Court's ability to review and decide important issues of federal telecommunications law would be wholly dependent on what review mechanisms, if any, the states created.

and Breyer, JJ., dissenting) (endorsing the same two-part test); *Green*, 474 U.S. at 68; *Pennhurst II*, 465 U.S. at 106; *Quern*, 440 U.S. at 346-49.

Petitioners seek to inject into the well-established two-part analysis a new and overriding element — rather a complex of ill-defined elements — a "careful balancing" of unspecified "federal and state interests." (*See* Pet. Br. at 41.) The Court should decline Petitioners' invitation, for several reasons. First, Petitioners' approach is inconsistent with the *Young* doctrine, which itself represents the appropriate balance between federal and state interests. Second, Petitioners' approach is standardless and unwieldy. Third, Petitioners' approach ignores the fundamental interest of citizens seeking to enforce federal rights. And fourth, Petitioners' approach has no support in a century of *Young* jurisprudence.

First, Petitioners' approach ignores the fact that the *Young* doctrine itself embodies the appropriate "balance of federal and state interests." *Papasan* v. *Allain*, 478 U.S. 265, 277 (1986). Petitioners apparently have cleaved onto language in the principal opinion in *Coeur d'Alene*, which asserted that "recent cases illustrate a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case." *Coeur d'Alene*, 521 U.S. at 278. That portion of the Court's reasoning, however, was expressly rejected by seven of the Court's nine members, and is neither a correct statement of current law nor a tenable extension of it. As Justice O'Connor, writing for three members of the Court, noted:

> [T]he principal opinion reasons that federal courts determining whether to exercise jurisdiction over any suit against a state officer must engage in a case-specific analysis of a number of concerns, including whether a state-forum is available to hear the dispute,

> what particular federal right the suit implicates, and whether special factors counsel hesitation. This approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence. The parties have not briefed whether such a shift in the *Young* doctrine is warranted. In my view, it is not.

Id. at 291 (O'Connor, J., concurring) (citations omitted).

Justice Souter, writing for four other members of the Court, was even more explicit in rejecting a balancing test approach: "*Young*'s rule recognizing federal judicial power in suits against state officers to enjoin ongoing violations of federal law *itself strikes the requisite balance* between state and federal interests. Where these conditions are met, no additional 'balancing' is required or warranted." *Id.* at 304 n. 6 (Souter, J., dissenting) (emphasis added). The approach advanced by Petitioners would undermine *Young*'s delicate equilibrium.

The central concern of the *Young* doctrine is to reconcile the need to enforce the supremacy of federal law with the principle of state sovereign immunity. The *Ex parte Young* Court and its successors weighed state and federal interests, and struck the appropriate balance, permitting suits to enjoin state officers from committing ongoing violations of federal law. As this Court recognized in *Pennhurst II*, "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of federal rights." 465 U.S. at 105.

The *Young* doctrine was crafted to take into account the states' sovereign immunity concerns. Specifically, a *Young* suit is available only against a state officer engaging in conduct that violates federal law, but not against the state itself. *See Ex parte Young*, 209 U.S. at 159-160 (permitting suit to proceed against

state officer because, *inter alia*, "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States"). In addition, the injunctive relief obtained in a *Young* action may be prospective only, and cannot take the form of a retrospective order to make compensation through payment of moneys from a state's treasury. *See Edelman* v. *Jordan*, 415 U.S. 651, 665-66 (1974). Nevertheless, it does afford prospective relief against the officers of a state, even where compliance with federal law may have substantial financial impact upon the state, so long as the effect is ancillary to compliance. *See id.* at 667-68 (citing *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)). And since they are designed to enforce the supremacy of federal law, *Young* suits are available to address violations of federal but not state law. *See Pennhurst II*, 465 U.S. at 106. These limitations — prospective but not retroactive relief, injunctive but not compensatory remedies, and federal but not state law — harmonize the sometimes competing objectives of federal supremacy and state sovereign immunity.

Since the *Young* doctrine already allots the maximum weight to state sovereign immunity principles consistent with federal supremacy, any additional balancing would eviscerate *Young*'s central principles. Superimposing a new balancing test simply is not appropriate in this area of the law: the state official's action either is or is not in violation of federal law, and if it is, it is inappropriate for a federal court to weigh the respective federal and state interests in deciding whether or not it will grant relief. A contrary finding would undermine the supremacy of federal law. The accommodation of state interests comes in the limitation of that relief to prospective, injunctive remedies for violations of federal law.

The *Young* doctrine already constitutes the appropriate balance between the supremacy of federal law and legitimate state interests. Petitioners' invitation to further "balancing" of

undefined state and federal interests would place an unwarranted thumb on that finely calibrated scale.

Second, Petitioners' suggestion that courts balance unspecified federal and state interests on a case by case basis before allowing a *Young* suit to proceed clouds a clear rule with a series of unspecified factors. Currently, as noted above, *Young* suits are available against a state official whenever a plaintiff (1) alleges that the official violated federal law, and (2) seeks prospective, injunctive relief. Petitioners' approach would gut the *Ex parte Young* doctrine and transform it into a mere principle of equitable discretion. Because Petitioners offer no standards for determining which additional federal and state "interests" should be balanced and what weight to assign to those interests, their approach offers little, if any, guidance to lower federal courts. Understandably, this Court has never used such a free-form "balancing" test in determining whether to apply the *Young* doctrine.

Third, the balancing approach Petitioners recommend ignores the interests of private persons in ensuring the protection of their federal rights. Last term, in *Garrett*, the Court affirmed the crucial role that *Ex parte Young* actions play within the federal system in ensuring that private persons enjoy all of the benefits and protections of federal law. *See Bd. of Trustees of the Univ. of Alabama* v. *Garrett*, 121 S. Ct. 955, 968 n.9 (Rehnquist, C.J.); *id.* at 969 (Kennedy, J., concurring). In finding the Eleventh Amendment barred a private claim under the ADA against a state instrumentality for money damages, the Court relied in part upon the fact that other avenues, including *Young* suits, remained for the enforcement of the statute against the states. As the Court explained:

> Our . . . holding that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with

> disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. *Those standards can be enforced* by the United States in actions for money damages, as well as *by private individuals in actions for injunctive relief under Ex parte Young.*

Id. at 968 n.9 (emphasis added). Were this not the case, there would be no mechanism to ensure state compliance with the supreme law of the land. The *Ex parte Young* mechanism is indispensable to the federal system because it is the only guarantee to private individuals that their state governments — otherwise immune from suit — will act in conformity with federal laws enacted for their protection.

Fourth, recognizing that *Young* harmonizes federal supremacy with state sovereign immunity, no majority of this Court has ever read *Young* to require the balancing of additional "interests" or considerations other than those built into the doctrine. Not even the few cases Petitioners do cite can support the proposition that state interests should be balanced against federal interests when the *Young* doctrine is otherwise found to apply. Rather, the cited cases have employed the clear-cut rule that *Young* suits are available whenever the plaintiff seeks prospective injunctive relief against an ongoing violation of federal law.

In *Papasan*, the Court noted that the line between suits permitted under *Young* and those forbidden by the Eleventh Amendment is often an indistinct one, but is demarcated by the respective remedies sought and the question of whether a federal or only a state law violation is alleged. *See Papasan*, 478 U.S. 278. Where only compensatory damages are sought, or where only state law violations are at stake, *Young*-type relief is unnecessary to "vindicate the federal interest in assuring the supremacy of that law." *Id.* (quotation marks omitted). In other

words, the balancing of interests is already embodied in the two part test.

Petitioners similarly misconstrue *Pennhurst II*. There, citizens living in a state facility for the mentally retarded challenged the conditions of their confinement, seeking *Ex parte Young* relief to restrain violations of *state* law. The Court denied the relief sought, but not because the state interests outweighed federal interests on some standardless judicial balancing scale. Rather, the Court denied *Young* relief because to grant it against state officials on the basis of state law "does not vindicate the supreme authority of federal law." *Pennhurst II*, 465 U.S. at 90. If *Young* had been extended to this situation, then the sovereign immunity of the states, guaranteed by the Eleventh Amendment, would have been nullified. *Id.* At 106. The "need to reconcile competing interests" in that case was not the need to balance state and federal interests, then, but the need to give effect to two *federal* constitutional principles.

As another example, in *Edelman*, plaintiffs claimed that defendant state officials administered federal-state programs of aid to the aged, blind, and disabled in a manner inconsistent with federal law. *See Edelman*, 415 U.S. at 653-55. The "equitable restitution" sought would have required the "payment of state funds . . . as a form of compensation" to those who had wrongfully been denied benefits in the past. *Id.* at 668. The Court found that this claim for "equitable" relief was actually the functional equivalent of a suit for money damages against the state for past conduct. *Id.* Crucially, the Court did not engage in any additional balancing of state and federal interests, instead devoting its *Young* inquiry to a determination of whether the relief sought in that case lay on the (permissible) *Young* or the (prohibited) Eleventh Amendment side of the dividing line between injunctive and compensatory relief. Once the Court found that the relief was merely a compensatory damages claim re-characterized as one for equitable relief, its *Young* inquiry was over.

No additional "balancing" of interests was required in these cases because the *Young* doctrine itself represents a balance between the objectives of federal supremacy and state sovereign immunity.[9]

B. Petitioners Misread *Seminole Tribe* To Require Congressional Authorization Before A *Young* Action Can Proceed

Petitioners assert that an *Ex parte Young* action is unavailable in this case because "[t]here is no text-based evidence that Congress meant to supplement [the § 252(e)(6) judicial review] mechanism by authorizing district courts to enjoin state commission members in contravention of the States' sovereign immunity." (Pet. Br. at 47; *see* Petition for Writ of Certiorari at 20-21.) Contrary to Petitioners' claim, the law has never required that Congress *authorize* an *Ex parte Young* action. *Ex parte Young* provides a prospective injunctive remedy under any circumstance in which its two-part test is satisfied. The availability of *Young* relief has never turned on Congressional authorization.

On the contrary, if Congress wishes to do so, it must *specifically preclude* the availability of an *Ex parte Young* action. *See Seminole Tribe* of *Florida* v. *Florida*, 517 U.S. 44, 74 (1996). In *Seminole Tribe*, the Indian Gaming Regulatory Act ("IGRA") established a regime of statutorily-mandated

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[9] Cases predating *Young* hewed to the same principles. *See, e.g., United States* v. *Peters*, 9 U.S. (5 Cranch) 115, 3 L.Ed. 53 (1809) (Marshall, C.J.) (noting that the mere presence of a strong state interest in the outcome of litigation did not bring the case within the ambit of the Eleventh Amendment as long as the state was not a party, even where the defendant was a state official acting on orders from the state legislature); *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824) (Marshall, C.J.) (holding that a state's tax on the Bank of the United States was unconstitutional, and consequently that state's auditor and tax collector could not take shelter behind the state's sovereign immunity shield).

good-faith negotiations between an Indian tribe and a State to cause the parties to enter into a compact authorizing the tribe to operate gaming facilities. Section 2710(d)(3) of the Act imposed upon the States an obligation to negotiate with a tribe in good faith. In the event of the parties' failure to reach an agreement, § 2710(d)(7) provided that a tribe could bring a cause of action to force the parties to reach an agreement. However, as the Court observed, this sole remedy available under the Act was strictly limited. Thus, under § 2710(d)(7):

> where a court finds that the State has failed to negotiate in good faith, the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing class III gaming on the tribal lands at issue.

Id. at 74-75.

Rather than adhere to the strictly limited mechanism specifically provided in § 2710(d)(7), the plaintiff Indian tribe attempted to enforce the IGRA's good-faith bargaining provision in § 2710(d)(3) outside of the statutory procedure, via an action under *Ex parte Young*. The Court found that Congress had so limited and defined the good-faith bargaining right it provided in the IGRA with the procedural means for the right's effectuation that Congress manifested a clear purpose to

preclude the availability of an *Ex parte Young* action not subject to those limitations. *See id.* As the Court noted, "[i]f § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, § 2710(d)(7) would have been superfluous: it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*." *Id.* at 75. Thus, rather than standing for the proposition that Congress must authorize an *Ex parte Young* action, *Seminole Tribe* stands for the converse proposition: that Congress must clearly and affirmatively preclude one. This makes sense: given the important role *Ex parte Young* plays in the federal system, the presumption is that a *Young* action is available unless Congress provides to the contrary.

Petitioners misapply *dictum* in *Seminole Tribe* — which related to the unusually limited remedial scheme of the IGRA — to suggest a more general rule that the mere presence of a remedial mechanism in a federal statute demonstrates a Congressional intent to preclude the availability of *Ex parte Young* relief. (*See* Pet. Br. at 45.) Specifically, Petitioners rely on the *Seminole Tribe* Court's statement that "where Congress has prescribed a detailed remedial scheme for the enforcement of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.* Members of the Court have since clarified that this *dictum* — borrowed from the line of cases originating with *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) — is not a general principle of law. The controlling portion of the concurrence in *Coeur d'Alene* made it abundantly clear that *Seminole Tribe* did not incorporate "the inquiry employed in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), into our *Young* jurisprudence." *Coeur d'Alene*, 521 U.S. at 295 (O'Connor, J., concurring). Indeed, no opinion of the Court prior to or since *Seminole Tribe* has suggested that the *Bivens*-type

considerations have any place in the purely structural analysis of whether an action seeks prospective injunctive relief against the officers of a state to prevent ongoing violations of federal law, so that the Eleventh Amendment is inapplicable under *Ex parte Young*.

Relying on this inauthoritative *dictum* from *Seminole Tribe*, Petitioners would have the Court assume that Congress meant no *Ex parte Young* relief to be available, unless Congress has supplied specific "text-based evidence" of its intent to authorize it. (*See* Pet. Br. at 47.) *Seminole Tribe,* however, does not stand for the general proposition that the mere fact that a statute includes a remedial provision or scheme — as numerous statues do — requires Congress to authorize the availability of a separate *Ex parte Young* action. *Seminole Tribe*'s holding was based upon the extraordinary clarity in which Congress expressed its purpose to preclude under the specific structure and language of the IGRA — a statute in which the negotiation right and remedy were so intimately related as to be virtually identical. Only in the exceedingly rare circumstance in which Congress provided a remedial scheme as limited as that at issue in *Seminole Tribe* would there be any reason to question the availability of a *Young* action without Congressional authorization.

Apparently, the source of Petitioners' theory that Congressional authorization is required is language in a footnote in *Seminole Tribe* that states: "Contrary to the claims of the dissent, we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act." *Seminole Tribe*, 517 U.S. at 75 n. 17 (emphasis in original). To the extent Petitioners rely on this statement, they necessarily take it out of context. The Court noted this point not to impose a requirement of Congressional authorization, but to explain that, where — as in the case of the IRGA — Congress otherwise clearly

manifested an intent to preclude *Ex parte Young* actions, Congress could negate its apparent intent by specifically authorizing the availability of such actions. Thus, in its proper context, this language only reaffirms the principle that, by its objective and unequivocal manifestations, Congress may preclude the availability of an *Ex parte Young* action based upon specific statutory rights. Accordingly, Petitioners misstate *Seminole Tribe* in suggesting that it requires that Congress authorize an *Ex parte Young* action.

In the present case, § 252 of the Telecommunications Act does not provide a remedial scheme remotely comparable to that under the IGRA. Indeed, § 252(6) — which provides that any person "aggrieved" by the determination of a state commission "may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section," 47 U.S.C.§ 252(6), and which the plaintiffs seek to enforce — contains no remedial limitations at all. In such a case, an *Ex parte Young* action would not represent an end-run around a carefully limited remedial scheme designed to define the scope of the underlying federal right. Rather, it would be entirely consistent with the statute it seeks to enforce. No inference can be drawn from the structure of legislation, such as the Telecommunications Act, to suggest that Congress meant to preclude an action under *Ex parte Young*.

C. *Young* Applies Whether The Authority Underlying The State Official's Action Is Valid Or Invalid

Petitioners suggest that an *Ex parte Young* action may be brought against state officials only with respect to actions outside the scope of the official's valid authority, and that suits predicated on "discretionary" actions within the bounds of valid statutory authority are *per se* barred by the Eleventh Amendment. (*See* Pet. Br. at 42-44.) This suggestion should be rejected. There is no requirement in *Young* that the authority

underlying the state official's action be invalid. Petitioners' suggestion clouds well-established *Young* jurisprudence by importing concepts from inapposite cases and common law defenses of immunity. An *ultra vires* requirement has never been part of *Young*, and there are no valid grounds for so extending the law.

In *Young* itself, a suit was allowed to proceed against a state official despite the fact that his act was not *ultra vires*. The official's uncontested authority from the State of Minnesota was insufficient to insulate him from suit in federal court. Thus, in the case where the officer's act, even though consistent with state law, comes into conflict with federal law, *Young* establishes a fiction that the official "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 159-60. The basis for this fiction is that "the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* After *Young*, this Court has consistently permitted suits against officials acting within the scope of their authority. *See, e.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000); *Hodel*, 452 U.S. 264 (1981); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 n.6.

Petitioners' proposed *ultra vires* requirement is unsupported in law. They cite *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), (Pet. Br. at 43-44), a decision that did not even mention *Ex parte Young*. The alleged injury in *Larson*, a common law tort based on interpretation of a contract for the sale of surplus coal, had no basis in either the United States Constitution or any federal law. *Larson*, 337 U.S. at 693-94 (plaintiff's argument "fundamentally rests" on claim that "the commission of a tort cannot be authorized by the sovereign"); *see also Florida Dep't State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 693 (1982) (conduct complained of in *Larson* "constituted at most a tortious deprivation of property").

Since the acts in *Larson* were not alleged to constitute violations of the U.S. Constitution or federal law, the legal fiction of *Ex parte Young* — deeming acts in violation of the Constitution and federal law to be *ultra vires* for the purposes of Eleventh Amendment immunity — was not implicated. Thus, *Larson* did not introduce any limitations on *Ex parte Young* actions, but rather merely rejected the plaintiff's invitation to recognize a new exception to the implied sovereign immunity of the federal government for violations of non-federal rights.

Here, in contrast to *Larson*, the underlying action alleges that state officials violated a federal statute, the Telecommunications Act. *Larson* does not undermine Respondents' right to seek redress in federal court in this case. Nor can *Larson* be used — fifty years later — to support Petitioners' extraordinary new proposition, that the act complained of must be *ultra vires*.

Petitioners' *ultra vires* argument also conflates distinct legal concepts: common law defenses of immunity and *Young*'s threshold jurisdictional requirement of a violation of federal law. Immunity defenses are available under certain circumstances to shield government officers sued in their personal capacities from liability for violations of federal law committed under a valid grant of authority. *Ex parte Young*, by contrast, authorizes suits against officers in their official capacities regardless of whether the officers' acts are authorized, so long as the suit seeks prospective relief for a violation of federal law.[10] To confuse the two is to clothe common law defenses, born of policy considerations and political compromises, with the mantle of a state's sovereign immunity.

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[10] In the context of 28 U.S.C. Section 1983, the Court has held that the Eleventh Amendment is not implicated solely by the fact that the action was taken within the official's authority. *See Hafer* v. *Melo*, 502 U.S. 21, 31 (1991) (the Eleventh Amendment does not immunize state officials from personal liability under Section 1983 "solely by virtue of the 'official' nature of their acts").

Such an expansion of the immunity defenses is unprecedented and uncalled for.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* NOW Legal Defense and Education Fund respectfully urges that this Court affirm the decision below.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF BELLSOUTH, VERIZON, AND UNITED STATES TELECOM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT ILLINOIS BELL TELEPHONE COMPANY

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, *amici* BellSouth Corporation ("BellSouth"), Verizon Communications Inc. ("Verizon"), and the United States Telecom Association ("USTA") state the following:

BellSouth Corporation. BellSouth has no parent company, and no publicly owned company owns 10% or more of its stock.

Verizon Communications Inc. Verizon has no parent company, and no publicly held company owns 10% or more of its stock.

United States Telecom Association. USTA is a non-profit trade association. USTA has no parent companies, subsidiaries, or affiliates with respect to which disclosure is required by Rule 29.6.

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INTEREST OF *AMICI CURIAE* [1]

BellSouth Corporation ("BellSouth") and Verizon Communications Inc. ("Verizon") are incumbent local exchange carriers ("LECs"), and the United States Telecom Association ("USTA") is a trade association representing the interests of incumbent LECs. Incumbent LECs are subject to unprecedented obligations under the Telecommunications Act of 1996 ("1996 Act"). Those obligations are implemented through interconnection agreements that have been held to be subject to the interpretation and enforcement authority of state public utility commissions like the Illinois Commerce Commission ("ICC"), whose members are the

[1] The parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

petitioners in this case. Because many of the most significant regulatory determinations concerning the duties imposed under the 1996 Act take place in cases involving the interpretation and enforcement of existing agreements, it is of the utmost importance to incumbent LECs that federal courts are able to ensure that state commissions are implementing the 1996 Act uniformly and in accord with the expressed intent of Congress. This will be possible only if state commission interpretation and enforcement decisions are subject to federal court review, as Congress intended.

SUMMARY OF ARGUMENT

I. The 1996 Act confers federal jurisdiction "[i]n *any* case in which a State commission makes a determination under this section." 47 U.S.C. § 252(e)(6) (emphasis added). Because state commissions derive their authority over interconnection agreements from § 252, their decisions interpreting or enforcing such agreements necessarily constitute determinations under § 252 that are subject to federal district court review under § 252(e)(6).

A. The ICC itself recognized that the source of its "jurisdiction . . . to interpret and enforce the terms of interconnection agreements" was, at least in part, "Section 252 of the Telecommunications Act of 1996." J.A. 112a. That is undeniably true: under the regulatory scheme of the 1996 Act, the interconnection agreement at issue here is tantamount to a federal tariff, subject to approval by the ICC under authority delegated by Congress and according to federal standards. Under this Court's precedents, "the question of tariff construction . . . was within the exclusive primary jurisdiction" of the ICC by virtue of the delegation of authority in § 252. *United States v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956); *see Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Accordingly, the determination at issue here was "under" § 252, and

Congress granted federal courts jurisdiction to review such determinations.

B. If there were any ambiguity on this point, it has been resolved by the Federal Communications Commission ("FCC"), the federal agency responsible for implementing the requirements of the 1996 Act. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In a directly analogous case, the FCC ruled that the refusal of the Virginia State Corporation Commission ("SCC") to "interpret and enforce . . . interconnection agreements" constituted a "'fail[ure] to act to carry out its responsibility' *under section 252*." Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000) ("*Starpower Preemption Order*") (quoting 47 U.S.C. § 252(e)(5)) (emphasis added).

II. A. This Court has made clear that Congress may, in the exercise of its Article I powers, condition a grant of authority to a State on the State's waiver of immunity from suit in federal court. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)). That principle controls here: Congress has validly conditioned the exercise of federal authority on consent to suit in federal court. The language of § 252(e)(6) makes unmistakably clear that, if a state commission exercises authority under § 252, a federal court has jurisdiction to review that determination. As this Court noted in *AT&T*, "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." 525 U.S. at 378 n.6. Accordingly, the ICC waived its Eleventh Amendment immunity in this case

when it knowingly exercised jurisdiction "under . . . Section 252." J.A. 112a.

The reference in § 252(e)(6) to federal courts' authority "to determine whether the agreement or statement meets the requirements of" §§ 251 and 252 does not limit federal courts' jurisdiction in a case like this one. The quoted language refers not to the circumstances in which a federal court has jurisdiction but instead to the scope of federal court review. The review sought here, in any event, fits comfortably within that language.

B. The nearly uniform holdings of the federal courts of appeals that a suit like this one is a straightforward *Ex parte Young* action are correct. Contrary to petitioners' claim, sovereign immunity does not prevent a court in equity from hearing an action to enjoin an official from acting on an agency's unlawful adjudicatory order. *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 185 (1938); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Nor is there any indication in the text of the 1996 Act that Congress intended to limit the authority of federal courts to determine whether a state commission has implemented the 1996 Act in a manner consistent with federal law. An *Ex parte Young* suit is designed precisely for that purpose.

ARGUMENT

I. A STATE COMMISSION'S INTERPRETATION OR ENFORCEMENT OF AN EXISTING INTERCONNECTION AGREEMENT IS A "DETERMINATION UNDER" SECTION 252

Section 252(e)(6) provides that, "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court." 47 U.S.C. § 252(e)(6). This language is unambiguous: Congress conferred jurisdiction

on federal district courts in "*any case*" in which a state commission makes a determination under § 252. Because an interpretation or enforcement decision of a state commission is a determination "under" § 252, a district court has subject matter jurisdiction under § 252(e)(6) to review the decision.

A. Under the 1996 Act's Regulatory Scheme, a State Commission's Authority To Resolve Disputes over Interconnection Agreements Derives from Section 252

The language of the statute, read in light of established law governing regulatory statutes like the 1996 Act, makes plain that the ICC's determination was made "under" § 252. As this Court observed in *Ardestani v. INS*, 502 U.S. 129 (1991), "'under' means 'subject [or pursuant] to' or 'by reason of the authority of.'" *Id.* at 135 (citation omitted; alteration in original). The determination at issue here meets this definition because the ICC did act pursuant to, and by reason of the authority of, § 252. Under § 252, Congress expressly granted state commissions the power to arbitrate and to approve (or reject) interconnection agreements according to federal standards. As the Seventh Circuit and three other courts of appeals have recognized, that power to approve or reject interconnection agreements carries with it "the authority to interpret and enforce" the terms of such agreements. *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001); *see also Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th

Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000).[2]

Petitioners and their *amici* believe that these precedents are wrong and that the only determinations that are "under" § 252 are decisions "to approve agreements . . . and decisions to reject or modify agreements." New Jersey, *et al.*, Amicus Br. at 7; *see* Pet'rs Br. at 18-19. That argument is belied, however, by the very language of the ICC determination at issue. Ameritech had challenged the authority of the ICC to decide a dispute that concerned jurisdictionally interstate traffic. The ICC rejected that jurisdictional challenge precisely because, in its view, its authority over the dispute had been delegated by Congress: the ICC specifically held that its jurisdiction "to interpret and enforce the terms of interconnection agreements" arose "under the Public Utilities Act *and Section 252 of the Telecommunications Act of 1996*." J.A. 112a (emphasis added).[3]

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[2] For this reason, it is far from clear that a state court would have jurisdiction to review the determination at issue here. Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement." 47 U.S.C. § 252(e)(4). The 1996 Act uses the same language in *granting authority* to state commissions that it uses in *excluding review* by state courts: state commissions have authority to "approve or reject" an agreement (*id.* § 252(e)(1)). If that language gives state commissions the power to rule here, then the same language in § 252(e)(4) must be read to exclude state court jurisdiction in this circumstance as well.

[3] The fact that the ICC's jurisdiction over the dispute was also "under" the Illinois Public Utilities Act is no obstacle to finding that its jurisdiction was "under" § 252. The 1996 Act confers jurisdiction on state commissions, defined as "the commission, board, or official . . . which *under the laws of any State* has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41) (emphasis added). The ICC was able to exercise the authority delegated by federal law only because of its authority under state law, and therefore the ICC properly relied on both federal and state law as the source of its jurisdiction below.

The ICC's decision and the decisions of the Fifth, Seventh, Eighth, and Tenth Circuits are correct on this point, and petitioners' brief is wrong. When a federal regulatory statute delegates "law-making power over certain aspects of commercial relations" to an administrative agency, it is that agency that must make determinations as to issues that implicate the "expert administration of the regulatory scheme laid down" by the statute. *Western Pac.*, 352 U.S. at 65 (internal quotation marks omitted). The paradigm application of that principle is in regimes like the 1996 Act involving common carrier regulation and filed tariffs.[4] In such regimes, where an agency is entrusted with the power to *set* the terms of the tariff to ensure that such terms are just, reasonable, and nondiscriminatory (for example), the agency must likewise have an opportunity to *construe* the terms of the tariff when such construction is in dispute. *See Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922).

Preliminary resort to the responsible administrative agency is required whenever a dispute "raises issues of . . . policy which ought to be considered by the [agency] in the interests of a uniform and expert administration of the regulatory scheme." *Western Pac.*, 352 U.S. at 65. In *Western Pacific*, this Court held that it was for the relevant federal agency to determine, in the first instance, whether steel casings filled with napalm gel qualified as "incendiary bombs" in light of the considerations behind the category established in the tariff. *Id.* at 67. Here, that rule mandates that the ICC — the agency with the authority to ensure that the *terms* of the parties' agreement comply with the substantive standards of the 1996 Act — likewise have authority to ensure, in the first instance, that such agreements are

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[4] As Verizon explains at length in its Petitioner's Brief in Nos. 00-1531 and 00-1711, interconnection agreements operate as federal tariffs.

implemented in accordance with those federal standards. In this case, for example, determining the scope of the parties' obligation to pay reciprocal compensation on Internet-bound traffic required application of a then-unsettled legal standard to complicated, technical facts, a task that necessarily implicated the ICC's administrative expertise.[5]

This understanding of state commission authority under § 252 gives effect to congressional intent as expressed in the language and structure of the 1996 Act. The type of policy determination that Congress most clearly intended for state commissions to make — and for federal courts to review — may arise either before or after approval of an agreement. *See Western Pac.*, 352 U.S. at 68 (noting "the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied"). For example, parties may choose to adopt terms as to some issues that simply track the requirements of the Act and the FCC's regulations. In those circumstances, a dispute over the requirements of the agreement is equivalent to a dispute over the terms of the Act.

If such a dispute arises during the parties' negotiations, they may submit it to the state commission for arbitrated resolution. No one denies that the resulting state commission determination would be reviewable under § 252(e)(6). The outcome should be no different merely because the dispute lies dormant at the time the parties negotiate their agreement and does not come up until later, when the state commission is asked to interpret or enforce the agreement.

This case provides an apt illustration. The parties adopted reciprocal-compensation provisions that track

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[5] That the ICC erred does not detract from the general point. Instead, it simply emphasizes the significance of judicial review on the record of each of the ICC's determinations.

the requirements of the 1996 Act. At the time of adoption, the parties apparently did not specifically discuss the application of those provisions to Internet-bound traffic. Had the dispute arisen during the course of negotiations, the ICC would have arbitrated the issue and approved an agreement embodying its resolution of the disputed issue. Its determination would then have been subject to review under § 252(e)(6). To argue that Congress intended state commissions to make the necessary determination in one circumstance but not in the other, or that Congress intended federal courts to review such determinations in one circumstance but not in the other, not only misreads the language of the statute, but also attributes an absurd intention to Congress. Basic principles of statutory construction forbid that result. *See United States v. Brown*, 333 U.S. 18, 27 (1948); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

Nor is it surprising that the ICC was asked to resolve this issue only after the agreement was approved. In 1996, the proper treatment of Internet-bound traffic was a relatively insignificant issue. It was only when the volume of such traffic "exploded" that the issue took on real economic significance. Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, 2001 WL 431687, ¶ 19 & n.45 (rel. Apr. 27, 2001) (*"ISP Remand Order"*), *petitions for review pending*, Nos. 01-1218 *et al.* (D.C. Cir.). Nonetheless, the practical stakes in this dispute and others like it are enormous: Verizon alone was billed more than one *billion* dollars for Internet-bound calls in 2000; industry-wide, incumbent LECs have been forced to transfer many billions of dollars to their competitors. *Id.* ¶ 70

& n.132.[6] These transfers have "created severe market distortions," *id.* ¶ 76, discouraging the development of real competition and undermining the principal goal that the 1996 Act was designed to promote. The lawfulness of these transfers has almost invariably been determined in proceedings like the one on review. *Id.* ¶ 70 n.132. In the absence of federal judicial review, federal courts' ability to ensure that federal policy is vindicated would be severely curtailed.

B. The FCC Has Confirmed that State Commission Authority To Interpret and Enforce Interconnection Agreements Is Under Section 252

The text of the 1996 Act makes clear that state commissions derive their authority to interpret and enforce previously approved interconnection agreements. But even if there were some ambiguity on this score, the FCC has resolved the matter by authoritatively interpreting the statute to invest state commissions with precisely that power.

Under § 252(e)(5), "[i]f a State commission fails to act to carry out its responsibility *under this section* in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter." 47 U.S.C. § 252(e)(5) (emphasis added). The FCC was recently called upon to take action under § 252(e)(5) when the Virginia SCC declined to rule in an enforcement dispute between a competitive LEC ("CLEC") and Verizon concerning the same substantive issue presented in this case — reciprocal compensation for

[6] Because Internet-bound traffic — and the reciprocal-compensation obligations that such traffic generates under the ICC's order — is "one-way," CLECs have been able to engage in "regulatory arbitrage" by "target[ing] ISP customers" solely "to share in the reciprocal compensation windfall." *ISP Remand Order* ¶¶ 69, 70, 74.

Internet-bound traffic. *See Starpower Preemption Order*, 15 FCC Rcd at 11278, ¶ 4 & n.7.

After the Virginia SCC refused to act, the CLEC filed a petition with the FCC under § 252(e)(5) asking it to assume the state commission's responsibility and resolve the dispute. The FCC granted the petition, holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252." *Id.* at 11279, ¶ 6.

The FCC's reading of the statute is the only one consistent with the statute's language. If there were any ambiguity, however, the Court would owe *Chevron* deference to the FCC's construction of the Act. *See AT&T*, 525 U.S. at 397.[7] Accordingly, the *Starpower Preemption Order* strongly supports affirmance on the first question presented: an action interpreting or enforcing an interconnection agreement is a determination under § 252 and therefore subject to federal district court review under § 252(e)(6).

[7] The Fourth Circuit has suggested that the FCC's ruling "does not bear on" the proper construction of § 252(e)(6), because that ruling "interprets the meaning of State commission 'responsibilities' under § 252 in the context of a State commission's failure to take action, rather than in the context of State commission 'determinations' which are reviewable in federal court under § 252(e)(6)." *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 303 n.6 (4th Cir.), *cert. granted in part sub nom. Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland*, 121 S. Ct. 2548 (2001) (Nos. 00-1531 & 00-1711). That distinction makes no sense: if a matter or proceeding is "under" § 252, then surely a state commission's determination in such a proceeding is likewise "under" § 252. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).

II. FEDERAL COURT JURISDICTION OVER CLAIMS UNDER SECTION 252(e)(6) IS CONSISTENT WITH THE ELEVENTH AMENDMENT

The Eleventh Amendment affirms that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). Consistent with that principle, "a State may waive its sovereign immunity by consenting to suit." *College Savings Bank*, 527 U.S. at 670. In addition, under this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), when a suit asserts that a state official's action constitutes an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective, "the suit '[is] not a suit against a State'" and the Eleventh Amendment is not implicated. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 292 (1997) (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and concurring in the judgment) (quoting *Ex parte Young*, 209 U.S. at 154); *see also id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

Here, the ICC waived its sovereign immunity by exercising its jurisdiction under § 252 to interpret and enforce an interconnection agreement with full knowledge that § 252(e)(6) authorizes suit in federal court in any case in which a party is aggrieved by such a determination under § 252. Moreover, even if the ICC had not waived its immunity, an *Ex parte Young* suit is available in these circumstances to enforce compliance with federal law. Accordingly, the Eleventh Amendment poses no bar to an action under § 252(e)(6).

A. The State Waived Its Immunity by Exercising the Conditional Authority Granted Under the 1996 Act

The United States may secure a State's consent to suit in federal court if it satisfies two requirements. First, it must make such consent a condition to the exercise of authority validly offered to the States. *See Petty*, 359 U.S. at 281-82. Second, Congress must "manifest[] a clear intent to condition" the State's exercise of authority "on a State's consent to waive its constitutional immunity." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). Both requirements are met here.

1. In *College Savings Bank*, the Court rejected the constructive waiver doctrine of *Parden v. Terminal Railway*, 377 U.S. 184 (1964). Under *Parden*, Congress could lawfully condition a State's ability to engage in an activity for which no congressional authorization is otherwise necessary — in *Parden*, running a railroad — on the State's consent to waive its Eleventh Amendment immunity. *See id.* at 192. *College Savings Bank* overruled *Parden* and established that, when a State's only alternative to submitting to federal court jurisdiction is to abstain from a lawful activity *in which the State could engage without federal permission*, there can be no waiver: "the voluntariness of waiver [is] destroyed . . . when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." 527 U.S. at 687.

Crucially, however, the Court made clear that its holding was limited to "*Parden*-style waivers," which are "*fundamentally different*" from those involved in cases such as *Petty*. *Id.* at 681, 686 (emphasis added). In *Petty*, the Court held that Congress may lawfully predicate the approval of an interstate compact on a waiver of immunity to federal court suit. *See* 359 U.S. at 281-82 ("States who are parties to the compact by

accepting it and acting under it assume the conditions that Congress under the Constitution attached."); *College Savings Bank*, 527 U.S. at 686 (describing *Petty* as holding that "a bistate commission which had been created pursuant to an interstate compact . . . had consented to suit by reason of a suability provision attached to the congressional approval of the compact").

Because States cannot form an interstate compact without obtaining express authority from Congress (*see Petty*, 359 U.S. at 282 n.7), Congress was not "exclu[ding]" the States "from otherwise permissible activity" in conditioning approval of the compact on consent to suit. *College Savings Bank*, 527 U.S. at 687. Instead, Congress was merely withholding a grant of authority — a "gift or gratuity" — to which the States had no preexisting right and could not have obtained without congressional action. *Id.* Indeed, even the dissenting Justices in *Petty* recognized that there was "[n]o doubt Congress could have insisted upon a provision waiving immunity from suit in the federal courts as the price of obtaining its consent to the Compact." 359 U.S. at 285 (Frankfurter, J., dissenting).

This Court has likewise recognized that the lawfulness of *Petty*-style waivers finds significant support in Spending Clause jurisprudence, under which Congress may condition a State's receipt of federal funds on waiver of some right. *See College Savings Bank*, 527 U.S. at 686. For instance, Congress may lawfully condition States' receipt of federal highway funds on adoption of a minimum drinking age of 21. *See South Dakota v. Dole*, 483 U.S. 203 (1987); *see also College Savings Bank*, 527 U.S. at 686 (*Dole* establishes that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions"). As in *Petty*, the States

in these cases have no preexisting right to federal funds: "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Id.* at 686-87.

The 1996 Act is directly analogous to the situation in *Petty* and the Spending Clause cases. States have no preexisting right to implement a federal statute. Rather, it is wholly within the discretion of Congress to determine whether States will be invited to participate in the implementation of a federal program. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (discussing Congress's authority to create such schemes of "cooperative federalism"). Accordingly, just as in *Petty* and the Spending Clause cases, the conduct at issue here would not be permissible without congressional action, and it is perfectly constitutional for Congress to condition that grant of new authority on the State entities' consent to be sued in federal court, as it has done in § 252(e)(6).

Petitioners and their *amici* argue that the conditional grant of authority here was unconstitutional because it forces the States to choose between "abandon[ing] regulation" of local telephone companies or consenting to suit in federal court. Council of State Gov'ts, *et al.*, Amicus Br. at 19; *see* Pet'rs Br. at 36-40. That argument misapprehends the 1996 Act. The statute in no way requires States to waive Eleventh Amendment immunity as a condition of continuing to apply existing state regulation to local telecommunications. The Act requires waiver only if the State wishes to exercise *federal authority* to oversee new *federal* requirements for access by competitors to incumbents' local networks.[8] At the same time, the statute expressly

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[8] The suggestion that this offer of authority is not a "gratuity" because the performance of federal regulatory functions by the State actually saves the United States the cost of "setting up . . . local field

preserves *state* authority over local telecommunications, so long as state regulations are "not inconsistent" with the new federal regime. 47 U.S.C. § 261(b); *see also id.* §§ 253(b), 261(c).

Moreover, insofar as the 1996 Act displaces inconsistent state regulations, it does so *irrespective of whether the State waives Eleventh Amendment immunity*. The federal standards enacted by the 1996 Act preempt conflicting state rules to the same extent regardless of whether a State chooses to waive its immunity and implement the federal standards or to retain its immunity and allow the FCC to undertake that role. *See AT&T*, 525 U.S. at 378 n.6 ("[T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."). This preemption is entirely within Congress's constitutional authority. *See FERC v. Mississippi*, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities.").

Indeed, this Court rejected a closely related argument in the Tenth Amendment context in *Hodel*. The argument there was that "the threat of federal usurpation of their regulatory roles coerces the States into enforcing the Surface Mining Act." 452 U.S. at 289. The Court emphatically rejected the claim that this

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office[s]" (Council of State Gov'ts, *et al.*, Amicus Br. at 16) misunderstands the constitutional test. The offer of authority is a gratuity because Congress is in no way bound to permit the States to exercise that authority. If the States consider the offer unattractive, they can reject it; indeed, at least one State has. *See* Memorandum Opinion and Order, *Cox Virginia Telecom, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 17958 (Chief, CCB 2000).

raised any constitutional problem. "A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Id.* at 290. "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Id.* Accordingly, where Congress chooses "to allow the States a regulatory role" in the federal scheme, this does not render the statute "constitutionally suspect." *Id.*

Just as Congress presumably could not *require* state commissions to administer the 1996 Act, *see Printz v. United States*, 521 U.S. 898 (1997), Congress cannot *require* state commissions to waive their Eleventh Amendment immunity. But just as Congress may indisputably make adherence to federal standards a condition of a State's participation in a federal regulatory scheme — even in an area of traditional state concern — Congress may likewise make consent to suit in federal court a condition of the State's exercise of federal authority under the 1996 Act. Such a condition does not constitute improper coercion. It gives the States a genuine choice, a choice that Congress is fully permitted to offer in exercising its undisputed authority under the Commerce Clause.

2. Petitioners argue that, even if Congress *could* condition States' participation in the 1996 Act's regulatory scheme on their consent to suit in federal court, Congress failed to make that condition sufficiently clear in the text of the 1996 Act. As noted above, however, the text of § 252(e)(6) establishes "by the most express language" (*Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal quotation marks omitted)) that any party aggrieved by a state commission determina-

tion under § 252 may bring an action in *federal* district court. 47 U.S.C. § 252(e)(6).

Petitioners argue that § 252(e)(6) "does not even plainly state that it covers decisions on issues beyond the agreement approval stage." Pet'rs Br. at 30. But, as we explained above, the ICC was able to interpret and enforce the 1996 Act interconnection agreement between the parties only by virtue of the delegation of authority to the ICC under § 252. And the ICC itself *recognized* that it was acting "under . . . Section 252." J.A. 112a. Petitioners therefore cannot plausibly claim that Congress failed to make clear that determinations made in the course of interpreting and enforcing interconnection agreements would be subject to review in federal court.

Petitioners also argue that, because § 252(e)(6) "allows federal actions only 'to determine whether the agreement or statement meets the requirements of'" §§ 251 and 252, "[r]eview of whether the content of an agreement complies with those requirements should occur at the time the agreement is approved." Pet'rs Br. at 19 (quoting 47 U.S.C. § 252(e)(6)) (footnote omitted). The quoted statutory language, however, refers not to the circumstances in which a federal court has *jurisdiction* but instead to the *scope* of review by a court that does have jurisdiction. Uncertainty about the *nature* of the proceedings in federal court cannot cast doubt on the fact that such proceedings are authorized.

Just as important, the review sought here fits comfortably within the scope of review described in § 252(e)(6). When a state commission resolves a dispute over the meaning of an interconnection agreement, it effectively sets the terms that will govern the incumbent's obligations to all CLECs that have chosen — or that may choose in the future — to avail themselves of the agreement's terms. If the agreement *as construed* does not "meet[] the requirements" of §§ 251

and 252, then the state commission's decision must be reversed. And among the requirements of §§ 251 and 252 is that the terms established through negotiation must be treated as "binding . . . without regard to the standards set forth" in § 251(b) and (c). 47 U.S.C. § 252(a)(1). Accordingly, when a state commission imposes terms that are inconsistent with the parties' negotiated terms, the resulting "agreement" no longer "meets the requirements" of §§ 251 and 252.

Finally, petitioners and their *amici* argue that § 252(e)(6) does not make clear that a state commission must be made a party in an action under § 252(e)(6); instead, they suggest that a § 252(e)(6) action could proceed between the private parties alone. *See* Pet'rs Br. at 30; Council of State Gov'ts, *et al.*, Amicus Br. at 12.[9] That argument is a curious one for petitioners to make because, if it were correct, it would — at the very most — alter the caption on the case; it would not deprive the federal district courts of jurisdiction.

If state commissions are indispensable parties to an action for review of a state commission determination, then Congress's intention to elicit the States' consent to suit in federal court is the "overwhelming implication[] from the text." *Edelman*, 415 U.S. at 673 (internal quotation marks omitted). If a "party aggrieved" by a "State commission . . . determination under" § 252 (47 U.S.C. § 252(e)(6)) may obtain review only by proceeding against the State, a state commission that makes a determination under § 252 necessarily does so with full knowledge that the action for review of that determination would be brought against it in federal court. By exercising authority under § 252, the State accepts a

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[9] This argument is unique among those deployed by petitioners in that it would apply to state commission determinations involving initial approval or rejection decisions as well as subsequent interpretation and enforcement decisions.

bargain that includes consent to suit in federal court in exchange for the exercise of authority over telecommunications competition under the 1996 Act. *Cf. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 121 S. Ct. 1589, 1596 (2001) ("The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed.") (alterations in original, internal quotation marks omitted).[10]

On the other hand, if a § 252(e)(6) action can proceed without the State's presence and, for that reason, § 252(e)(6) is not sufficiently unequivocal to elicit a waiver of the State's immunity, at most that would argue in favor of barring actions against state commissions as named parties.[11] It would not support dismissal of the entire case if otherwise properly filed in federal court under § 252(e)(6). For this reason, it is a matter of relative indifference to *amici* if the Court were to rule that an action under § 252(e)(6) should not proceed against the State itself, so long as the jurisdiction of federal courts to review state commission determinations under § 252 is preserved.

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[10] If it is correct that the State is an indispensable party, then the State is not among different classes of potential defendants to which Congress might have been referring. Rather, *every* case under § 252(e)(6) must proceed against the state commission. *Cf. Atascadero*, 473 U.S. at 245-46 (holding that reference to "any recipient of Federal assistance" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" because the statutory language could refer to "other class[es] of recipients of federal aid").

[11] A suit could still proceed against the state *commissioners* under *Ex parte Young*, even if the State did not waive its immunity. The issue of indispensability would not arise, because the commissioners would certainly be proper parties, even if not indispensable.

B. Exercise of Federal Subject Matter Jurisdiction Was Appropriate Under *Ex parte Young*

In its complaint in district court, Ameritech alleged that the ICC determination at issue violates federal law; it sought an injunction restraining the members of the ICC from taking action to enforce the ICC's order. Because Ameritech named the ICC's members, the Eleventh Amendment poses no obstacle to the suit: a complaint seeking prospective injunctive relief against a state officer to restrain alleged violations of federal law is a paradigm *Ex parte Young* action.

Petitioners and their *amici* argue that *Ex parte Young* is inapplicable when the action challenges the lawfulness of an adjudicatory order. But that argument fundamentally misconceives *Ex parte Young*.

1. When a suit is brought "against state officials, a question arises as to whether that suit is a suit against the State itself." *Pennhurst*, 465 U.S. at 101. Under this Court's decision in *Ex parte Young*, when a suit asserts that a state official's action constitutes an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective, "the suit '[is] not a suit against a State.'" *Coeur d'Alene*, 521 U.S. at 292 (O'Connor, J., concurring) (quoting *Ex parte Young*, 209 U.S. at 154). "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

The claims that Ameritech brought against the members of the ICC squarely fit this definition. The suit was against the members of the ICC, not the State itself. *Cf. Cory v. White*, 457 U.S. 85, 91 (1982) (holding that a suit against the State itself as a named

defendant is barred). The suit alleged an ongoing violation of federal law — that is, a state commission order requiring Ameritech to pay (and authorizing CLECs to retain) reciprocal compensation in violation of federal law. And the suit seeks purely prospective relief — an injunction barring enforcement of the ICC's order. There will be no effect at all on the State's treasury. *Cf. Edelman*, 415 U.S. at 668 (barring forms of relief that "require[] payment of state funds . . . as a form of compensation").

Under the rule articulated by seven members of this Court in *Coeur d'Alene*, therefore, *Ex parte Young* applies here. That conclusion fits easily within this Court's long tradition of non-statutory review of federal and state administrative action through the medium of suits for injunctive relief against executive branch officials. *Ex parte Young* itself was an action to enjoin the attorney general of Minnesota from enforcing an order of the state railroad commission requiring a reduction in rates. 209 U.S. at 127, 129-30. The cases in which state commissioners have been held to be subject to the jurisdiction of federal courts in cases like this one are legion. *See, e.g., State Corp. Comm'n v. Wichita Gas Co.*, 290 U.S. 561 (1934); *Railroad & Warehouse Comm'n v. Duluth Street Ry.*, 273 U.S. 625 (1927); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196 (1924); *Prendergast v. New York Tel. Co.*, 262 U.S. 43 (1923); *Smyth v. Ames*, 169 U.S. 466 (1898).

2. Petitioners argue that the ICC does not "violate federal law" when it misapplies substantive federal law. *See* Pet'rs Br. at 42. According to petitioners, the holding of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), a case involving the scope of the United States' sovereign immunity, dictates that a merely "incorrect" decision on a matter of federal law cannot provide grounds for relief against a state officer. Pet'rs Br. at 44. In a similar vein, the Council of State

Governments, *et al.*, argue that an equitable action against a state officer is *never* available to secure review of an agency's adjudicatory order. Both arguments misapprehend the nature of the action below and are inconsistent with *Ex parte Young* and this Court's sovereign immunity decisions.

It is simply wrong to portray this suit as an effort to secure an injunction against the ICC acting in its quasi-judicial capacity. Ameritech seeks an injunction against *enforcement* of the ICC's order, an order that is the result of a proceeding that has been completed. Accordingly, Ameritech is attempting neither to "'restrain [the ICC] from acting'" in its adjudicatory capacity (*cf.* Council of State Gov'ts, *et al.*, Amicus Br. at 21 (quoting *Ex parte Young*, 209 U.S. at 163)) nor to enjoin "'state court proceedings'" (*cf. id.* at 28 (quoting *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 294 (1970))).[12] There is no dispute that the ICC exercises quasi-legislative, quasi-judicial, *and* executive functions. The relief that Ameritech seeks directly implicates only the commissioners' executive function. This case does not remotely present the question whether a federal district court could *enjoin* an interpretation or enforcement proceeding under the 1996 Act.

Rather, the question is whether a suit against an executive officer to enjoin enforcement of an agency order is an appropriate method for obtaining review of an underlying administrative adjudication. This Court's precedents answer that question in the affir-

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[12] The suggestion that an injunction against enforcement would "require a federal court to . . . enjoin further proceedings in the state courts" (Council of State Gov'ts, *et al.*, Amicus Br. at 28) is likewise incorrect. The judgment of the federal court would preclude relitigation of any claims properly before it, but a state court that dismisses a suit under *res judicata* principles is doing its job; it is not restrained from doing it. *See* U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause).

mative because such a suit does not constitute a suit against the sovereign.[13] For example, in *Shields v. Utah Idaho Central Railroad*, the railroad sued the United States Attorney to enjoin a prosecution for a violation of the Railway Labor Act. 305 U.S. at 179-80. That Act charged the Interstate Commerce Commission with determining "whether a particular railroad fell within" the categories of railroads subject to the Act; the Act did not provide any method for obtaining review of that determination. *Id.* at 180, 183. After holding that Congress could appropriately delegate such a function to the Interstate Commerce Commission, the Court further determined that an action to restrain execution of the Interstate Commerce Commission's order was the appropriate method of obtaining judicial review of the determination itself. As the Court held, "[e]quity jurisdiction may be invoked when it is essential to the protection of the rights asserted." *Id.* at 183. "[R]espondent was entitled to resort to equity in order to obtain a judicial review of the questions of the

[13] The principle that the sovereign immunity of the United States poses no bar to the review of an administrative adjudication applies equally to state determinations. *See Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (holding that the principle that a suit against an "officer acting in excess of his authority or under an authority not validly conferred" is not a suit against the United States is "equally applicable" to federal and state officers); *Tindal v. Wesley*, 167 U.S. 204, 213 (1897) ("[W]hether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."); *see also Coeur d'Alene*, 521 U.S. at 292 (O'Connor, J., concurring) (relying on *United States v. Lee*, 106 U.S. 196 (1882), a suit against federal officers, to construe the scope of *Ex parte Young*). *Ex parte Young* itself relied on cases involving actions against the United States and individual States in determining the scope of sovereign immunity under the Eleventh Amendment. Petitioners tacitly acknowledge this principle by relying prominently on *Larson v. Domestic & Foreign Commerce*, a case involving federal, not state, sovereign immunity.

validity and effect of the Commission's determination purporting to fix its status." *Id.* at 184.

The Court reached the same conclusion in *American School of Magnetic Healing v. McAnnulty*. There, the Postmaster General had determined that certain letters were "a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises." 187 U.S. at 98. The plaintiff brought an action to enjoin the postmaster in Missouri from enforcing the order, in part on the ground that the Postmaster General's determination that the materials were fraudulent was incorrect. *Id.* at 101. The lower court dismissed the suit; this Court reversed. The Court held that the validity of the Postmaster General's determination was a legal question appropriate for review in court. "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *Id.* at 110.

That conclusion controls this case. If the ICC's order is invalid, as Ameritech has alleged, then an action to enforce it would be "unauthorized by any law." The effect on Ameritech's rights is dramatic, for the ICC has imposed an obligation to transfer tens of millions of dollars for the exclusive benefit of Ameritech's competitors. If that result is unlawful under the 1996 Act — and Ameritech alleges that it is — *Ex parte Young* guarantees Ameritech a federal forum to vindicate its rights.

For related reasons, the Court's analysis in *Larson* establishes that Ameritech's suit against the ICC commissioners may proceed. In that case, Congress had authorized a certain executive officer to sell surplus coal. The plaintiff sought to enjoin the sale of certain coal to a third party, alleging that the officer had contracted to sell the coal to the plaintiff. *See* 337

U.S. at 684. This Court ruled that the action should have been dismissed as a suit against the United States. In particular, the Court rejected the argument that "an officer given the power to make decisions is only given the power to make correct decisions." *Id.* at 695. "There is no warrant" for the contention that "his action . . . is beyond his authority and not the action of the sovereign" *as long as "the decision made by the officer does not relate to the terms of his statutory authority."* *Id.* (emphasis added). Because the officer, "like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with," his "action in so doing in this case was . . . within his authority even if . . . we assume that his construction was wrong." *Id.* at 703.

This case is different in at least two pivotal respects. First, it is clear from the 1996 Act itself that a claim that a state commission has misconstrued the parties' agreement inevitably *does* "relate to the terms of [its] statutory authority." *Id.* at 695. The purpose of state commission arbitration, approval, interpretation, and enforcement is to ensure that the terms governing the relationship between incumbent LECs and new market entrants "meet the requirements" of the 1996 Act, including the requirement that an interconnection agreement shall have "binding" effect (§ 252(a)(1)) and that the relationship between the parties shall be conducted "in accordance with the terms and conditions of the agreement" (§ 251(c)(2)(D), (c)(3)). 47 U.S.C. § 252(c); *see also id.* § 252(e)(2), (6). When a state commission misconstrues the terms of an interconnection agreement, it deprives that agreement of its binding effect and impermissibly alters the inter-carrier relationship. Such a determination therefore falls outside the scope of the state commission's statutory authorization;

indeed, it directly undermines a central statutory purpose.

Second, Ameritech maintains that the *order itself* is invalid as a matter of preemptive federal law. The order therefore confers on the commissioners no valid authority to enforce its dictates against Ameritech. In other words, Ameritech seeks "specific relief" from "action of an officer of the sovereign" that was "illegal" because the "exercise [of the officer's powers] in the particular case" would be contrary to binding federal law. *Larson*, 337 U.S. at 701-02. *Larson* specifically endorses injunctive relief in that circumstance. Indeed, as *Shields* establishes, an action against an officer seeking to enforce an adjudicatory order is the appropriate means to secure judicial review of that underlying order. In such circumstances, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (per curiam). Where an official has misconstrued governing law, "his actions would not constitute exercises of his administrative discretion," and "judicial relief from this illegality would be available." *Id.* at 582.

3. There is likewise no doubt that Ameritech has a valid basis for seeking to enjoin an ongoing violation of federal law. The order at issue requires Ameritech to "pay . . . reciprocal compensation for all calls . . . from its customers to [Internet service providers] that are the customers of the complainants." J.A. 123a. That order is lawful only to the extent that the ICC properly construed the interconnection agreement at issue, because § 252(a)(1) specifically provides that interconnection agreements like the one at issue here are "binding." 47 U.S.C. § 252(a)(1). Any action by the ICC to enforce an obligation contrary to the terms of an interconnection agreement would violate § 252(a)(1).

"A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual." *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 390 (1894). Federal courts have "jurisdiction to restrain their excessive and illegal acts." *Id.* at 391.

Moreover, because Ameritech's rights under its interconnection agreements are themselves federal rights, a state officer's effort to enforce an order that runs contrary to the terms of an interconnection agreement itself may be restrained as a violation of federal law. The Seventh Circuit mistakenly believed that whether the interconnection agreement at issue requires the payments ordered by the ICC is solely a matter of state contract law. Pet. App. 4a-5a. But, as Verizon has explained in its brief in the companion case, rights under an interconnection agreement are federal rights, and questions concerning the obligations they impose are federal matters. *See* Nos. 00-1531 & 00-1711 Verizon Br. at 20-29. Accordingly, an ICC order that is contrary to the terms of the parties' agreement would violate federal law for that reason alone.

4. Finally, petitioners briefly argue that, because § 252(e)(6) constitutes "'a detailed remedial scheme for the enforcement against a State of a statutorily-created right,'" Ameritech's suit may not proceed. Pet'rs Br. at 45 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996)). That argument misapplies *Seminole Tribe*.

First, petitioners' entire brief is premised on the argument that § 252(e)(6) prescribes no remedy at all for Ameritech's federal rights. One cannot coherently argue simultaneously that § 252(e)(6) does not even speak to Ameritech's claims *and* that § 252(e)(6) addresses those claims so specifically as to provide

evidence of Congress's intent affirmatively to preclude any alternative avenue of relief.[14]

Second, and more important, there is nothing about the relief that is available in an *Ex parte Young* suit that is inconsistent with or more far-reaching than the congressionally prescribed remedy in § 252(e)(6). On the contrary, the 1996 Act simply provides for judicial review and limits neither the remedies nor the sanctions available. Such suits are thus governed by the "general rule" under which, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992). An *Ex parte Young* suit would thus in no way expand the sanctions available under the 1996 Act. Indeed, a suit against a government agency pursuant to a valid waiver of sovereign immunity and an action for injunctive relief against an executive official are both long-established methods for securing judicial review of agency action. The circumstances here thus bear no meaningful resemblance to *Seminole Tribe*.

CONCLUSION

The Court should affirm the judgment of the court of appeals insofar as that court held that the district court had subject matter jurisdiction over this action under 47 U.S.C. § 252(e)(6) and that the Eleventh Amendment does not preclude the district court's exercise of that jurisdiction.

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[14] Indeed, as Verizon explains in its brief in the companion case, in the absence of affirmative evidence of congressional intent to foreclose judicial review, the presumption is that Congress intends for administrative action undertaken pursuant to a federal statute to be subject to judicial review.

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In the Supreme Court of the United States

RICHARD L. MATHIAS, ET AL.,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, ET AL.,

Respondents.

POST-ARGUMENT BRIEF FOR RESPONDENT ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS

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POST-ARGUMENT BRIEF FOR RESPONDENT ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS

Pursuant to Rule 25.6, respondent Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") respectfully submits the following post-argument brief to address — and formally to disavow — certain statements made by counsel for respondent WorldCom during oral argument yesterday. See *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 490 (1999) (citing post-argument briefs addressing points made during oral argument).

WorldCom's counsel conceded at oral argument that WorldCom does not speak for Ameritech. WorldCom's counsel acknowledged that his client's position is in direct conflict with Ameritech's position on the critical issue in the case: whether the federal courts have jurisdiction to adjudicate a *claim* that a state commission has violated federal law by nullifying provisions in commission-approved section 252 interconnection agreements that expressly limit the obligations imposed by those agreements to the requirements of the 1996 Act. Ameritech vigorously disagrees with the position espoused by WorldCom's counsel at oral argument, and seeks through this supplemental brief to make clear how its position differs from that advocated by WorldCom.

The dispute between the private carriers in this case (and in the companion case) involves provisions of section 252 interconnection agreements that govern the reciprocal compensation obligations between the parties. Like Verizon's agreements, the reciprocal compensation provisions of Ameritech's agreements specifically provide that the parties' reciprocal compensation obligations are "As Described in the Act" (J.A. 8a, 14a, 20a, 30a, 38a), which is in turn defined in each agreement to mean "as described in or required by the Act" (J.A. 8a, 13a, 19a, 30a, 37a). Ameritech's claim in this case is that the state commission violated the 1996 Act by nullifying those express statutory-based limitations on its

reciprocal compensation obligations, and it did so in an Order suffused with a discussion of federal law.

Contrary to the arguments of WorldCom, Ameritech contends that, at a minimum, the federal courts have jurisdiction to adjudicate Ameritech's *claim* that the state commission's determination that Ameritech must pay reciprocal compensation on Internet traffic is inconsistent with the reciprocal compensation requirements of the 1996 Act that were expressly incorporated into the parties' approved section 252 agreements. WorldCom's suggestion that this is not a federal claim defies common sense. The Act establishes a specific process for the formation of interconnection agreements and makes the agreements approved as a result of that process "binding" on the parties. Permitting a state commission to substitute its "interpretation" for unambiguous Act-based terms and conditions would render the agreement formation provisions of the Act a nullity.

The federal jurisdiction advocated by Ameritech would not "open the floodgates." Since 1996, telecommunications carriers have entered into thousands of interconnection agreements, yet there are only a few dozen reported cases in federal court regarding interpretative disputes. Overwhelmingly, those cases have involved claims, like the claim asserted here by Ameritech, that a state commission has disregarded provisions of an approved agreement that expressly limit the parties' obligations to the requirements of federal law, and thus hinge on a proper construction of the Act. Within that narrow category of disputes, the vast majority have arisen in precisely the factual context presented here — disputes arising out of a state commission's alleged failure to respect Congress's judgment that the reciprocal compensation requirements of the Act do not apply to Internet traffic. Trivial disputes have not given rise to federal lawsuits. Many section 252 agreements provide for ADR proceedings, which weed out smaller disputes. Only the most substantial disputes are taken to the state

commissions. The parties seek federal review of an even narrower range of state commission determinations in cases where a sizable sum of money is at stake, the competitive consequences are substantial, and federal issues are important. Once the basic federal issues have been sorted out, these disputes will decline still further. In an analogous context, there have been few federal court suits arising out of disputes over the terms of federal tariffs.

WorldCom's contention that Congress intended that some claims arising out of the interpretation of negotiated interconnection agreements belong in federal court and others (like Ameritech's claim in this case) belong in state court is absurd. Interpretive disputes arising out of federally-mandated interconnection agreements that implement federal statutory obligations unquestionably are federal in nature and, like federal tariffs, should be construed under federal law. Such disputes — which require application of the criteria of the 1996 Act (see J.A. 114a-119a) — are a proper subject of federal court review. WorldCom's (and the Seventh Circuit's) suggestion that such disputes should be "bifurcated" between federal court and state court would subvert and undermine Congress's objective of resolving contested issues expeditiously.

Congress simply could not have meant for interconnection disputes arising from the same agreement to run the gauntlet of two separate judicial systems, as WorldCom contends, with some issues litigated first in the federal system and other issues litigated years later in the state system, and with wasteful arguments over which issues fall on one side or another of "the federal-state divide," given "myriad possible fact patterns." World Com Reply Br. in 00-1531 & 00-1711 at 14. It should come as no surprise, therefore, that there is no support whatsoever in the text, structure, or legislative history of the Act for such a byzantine

jurisdictional scheme. Compare *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 24 (1982) (finding clear evidence in legislative history of Congressional intent that municipal labor disputes be resolved in state court). Rather, Congress anticipated federal court review over all state commission determinations. See *Bank One Chicago* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 275-276 (1996) (refusing to fragment jurisdiction under federal statute; "even if the text of [the act] could plausibly be read to create this decidedly inefficient jurisdictional scheme, we would hesitate to attribute such a design to Congress.").

CONCLUSION

The decision of the Seventh Circuit should be affirmed in part and reversed in part and the case remanded with instructions to the courts below to adjudicate Ameritech's claims on the merits.

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Respondents.

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF FOR RESPONDENT ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS

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MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to S. Ct. Rule 25.6, respondent Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") respectfully moves for leave to file the accompanying post-argument brief. As the Court knows, there are multiple respondents in this case. As a result of a coin toss, counsel for respondents WorldCom Technologies, Inc., MCI WorldCom Network Services, Inc., MCIMetro Access Transmission Services LLC, and Focal Communications Corp. (collectively, "WorldCom") was allotted the oral argument time for the private respondents in this case. As WorldCom's counsel acknowledged at oral argument yesterday, his client's position is in direct conflict with Ameritech's position on the critical issue in the case: whether the federal courts have jurisdiction to adjudicate a *claim* that a state commission has violated federal law by nullifying provisions in commission-approved section 252 interconnection agreements that expressly limit the obligations imposed by those agreements to the requirements of the 1996 Act. Ameritech vigorously disagrees with the position on this issue espoused by WorldCom's counsel at oral argument. Ameritech respectfully submits that the accompanying post-argument brief is necessary to make clear the extent of and bases for Ameritech's disagreement with the views advocated by WorldCom and that the brief would assist the Court in resolving this case.

For the foregoing reasons, the motion for leave to file the accompanying post-argument brief should be granted.

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Contrary to the arguments of WorldCom, Ameritech contends that, at a minimum, the federal courts have jurisdiction to adjudicate Ameritech's *claim* that the state commission's determination that Ameritech must pay reciprocal compensation on Internet traffic is inconsistent with the reciprocal compensation requirements of the 1996 Act that were expressly incorporated into the parties' approved section 252 agreements. WorldCom's suggestion that this is not a federal claim defies common sense. The Act establishes a specific process for the formation of interconnection agreements and makes the agreements approved as a result of that process "binding" on the parties. Permitting a state commission to substitute its "interpretation" for unambiguous Act-based terms and conditions would render the agreement formation provisions of the Act a nullity.

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Congress simply could not have meant for interconnection disputes arising from the same agreement to run the gauntlet of two separate judicial systems, as WorldCom contends, with some issues litigated first in the federal system and other issues litigated years later in the state system, and with wasteful arguments over which issues fall on one side or another of "the federal-state divide," given "myriad possible fact patterns." World Com Reply Br. in 00-1531 & 00-1711 at 14. It should come as no surprise, therefore, that there is no support whatsoever in the text, structure, or legislative history of the Act for such a byzantine

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CONCLUSION

The decision of the Seventh Circuit should be affirmed in part and reversed in part and the case remanded with instructions to the courts below to adjudicate Ameritech's claims on the merits.

Respectfully submitted.

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DECEMBER 2001

No. 00-878

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD L. MATHIAS, et al., *Petitioners*,

v.

WORLDCOM TECHNOLOGIES, INC., et al., *Respondents*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I, Michael E. Lackey, Jr., a member of the Bar of this Court, hereby certify that all parties required to be served have been served. On December 6, 2001, I caused a copy of the foregoing Motion for Leave to File Post-Argument Brief and Post-Argument Brief for Respondent Illinois Bell Telephone Company d/b/a Ameritech Illinois in the above-captioned case to be served on the persons listed on the attached service list by overnight courier, post pre-paid (or by hand where indicated).

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December 6, 2001

VIA MESSENGER
The Honorable Francis J. Lorson
Chief Deputy Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878

Dear Mr. Lorson:

As per our discussion today, I enclose for filing 40 copies of the page proofs of the Motion for Leave to File a Brief After Argument and the Brief After Argument for Respondent Illinois Bell Telephone Co. and a certificate of service. I will file the same number of replacement printed briefs tomorrow. Also enclosed is an additional copy of the page proofs of the Motion/Brief to be date stamped and returned for our records.

Thank you for your consideration of this matter.

Sincerely,

Michael E. Lackey, Jr.

Enclosures

cc: Counsel of Record (w/enclosures)

Supreme Court, U.S.
FILED
JAN 14 2002
CLERK

(23)

No. 00-878

IN THE

Supreme Court of the United States

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Petitioners,

v.

WORLDCOM TECHNOLOGIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' ~~MOTION TO FILE POST-ARGUMENT BRIEF~~ AND POST-ARGUMENT BRIEF

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6 pp

PETITIONERS' MOTION TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 25.6, Petitioners hereby move the Court for leave to file the attached post-argument brief. This brief addresses whether the Court should reach the merits of the questions presented in this case in light of the fact that the underlying judgment in the case affirmed the result reached by the Illinois Commerce Commission ("ICC"), of which Petitioners are the members. That issue was raised by the Court at oral argument in this case on December 5, 2001, and in an order issued on December 12, 2001, in the companion case of *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, Nos. 00-1531 and 00-1711 (consolidated). On January 7, 2002, the Court denied the motion of Respondent Illinois Bell Telephone Co., d/b/a/ Ameritech Illinois ("Ameritech"), for leave to file a post-argument brief and denied Petitioners' motion to file a response to Ameritech's brief, "without prejudice to filing a brief addressing only the jurisdictional question." Petitioners ask that the Court accept the attached brief on that issue.

POST-ARGUMENT BRIEF OF PETITIONERS

At oral argument, and in an order entered on December 12, 2001 in the companion case of *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, Nos. 00-1531 and 00-1711 (consolidated), the Court questioned whether it should reach the merits of the questions presented in this case in light of the fact that the lower courts had upheld the result reached by the ICC and entered no order against the ICC or Petitioners, its members. Petitioners believe that this Court can and should reach the questions presented in this case.

Although the position taken by the ICC on the underlying complaints was upheld below, its members have been required to defend its ruling in federal courts at every level, despite their claims of the absence of jurisdiction and constitutionally-grounded immunity. Throughout this litigation Petitioners have asserted their rights to be free from such federal court proceedings and from the entry against them of resulting judgments, whether favorable or not. Those claims implicate distinct but important interests of Petitioners, particularly as officials of a sovereign State. Policy considerations thus favor deciding these questions in this case despite the "favorable" outcome of the proceedings below.

While it is true that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," that principle is not a limitation grounded in Article III of the Constitution. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). The Court has recognized that appellate courts have discretion to consider an appeal "from an adverse ruling collateral to the judgment on the merits at the behest of the party who

has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Id.* at 334; *see also Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). The Court has thus permitted appeals to proceed from favorable judgments where "policy considerations" supported hearing the appeal, as long as dismissal was not required under Article III. *Roper*, 445 U.S. at 335 and n.7.

This case presents legal and policy considerations that favor reaching the merits of the questions presented. In this case Petitioners have not sought "a review of findings [they] deem erroneous which are not necessary to support the decree," *Electrical Fittings*, 307 U.S. at 242; instead, they appealed rulings on jurisdiction and immunity upon which the district court's ability to enter judgment depended. Although that judgment was favorable to Petitioners on the merits of the ICC ruling, it did not grant the relief Petitioners sought in their motions to dismiss the action, the denials of which are the subject of this case. *See Forney v. Apfel*, 524 U.S. 266, 271 (1998) (district court order gave petitioner "only half a loaf. . . some, but not all, of the relief she requested; and she consequently can appeal the District Court's order insofar as it denies her the relief she has sought.").

In addition, because of the manner in which the district court proceeded in this case, Petitioners could not have posed the questions presented herein without the entry of a judgment on the merits. The district court essentially compelled Petitioners to litigate the merits of the underlying complaints over their objections to being in federal court by deciding to rule on the merits before it considered Petitioners' motions to dismiss based on jurisdiction and immunity. *See* Jt. App. 150a. This effectively required Petitioners to defend their ruling without a determination of jurisdiction and prevented them from pursuing any interlocutory appeal, at least on the immunity issues under *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Thus, as this case proceeded, it was impossible for Petitioners to obtain a ruling on the federal courts' power over them prior to that power being exercised in the issuance of a judgment on the merits. *Cf. Roper*, 445 U.S. at 335 n. 7 (appeal from favorable judgment should be permitted where both favorable and unfavorable rulings were presented due to district court's "procedural error" of considering both issues, *citing Electrical Fittings*).

Petitioners, as officials of an agency of a sovereign State, have a clear stake in this appeal, well satisfying Article III. While the merits of the case in the lower courts turned on whether the ICC properly construed the underlying interconnection agreements, the questions presented in this case involve entirely collateral but equally important issues of statutory federal court jurisdiction and sovereign immunity. Petitioners maintained below that their decisions should not have been reviewed in federal court at all and that neither they nor the ICC should have been subject to a federal suit brought by a private party. As state officials, Petitioners have distinct and separate interests in being free of the burden of defending themselves or their state agency from suits that have been brought by private parties in federal courts and that seek relief potentially in excess of those courts' jurisdiction, even in cases in which that defense is ultimately successful. The importance of maintaining the balance be-

tween federal and state interests, whether in consideration of questions of constitutional immunity or of the manner in which the Court reads a jurisdictional statute providing for review of state action in federal court, presents a significant policy consideration that supports reaching the merits in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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MOTION FILED
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WORLDCOM TECHNOLOGIES, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF FOR RESPONDENT ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS

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MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to S. Ct. Rule 25.6, respondent Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") respectfully moves for leave to file the accompanying post-argument brief. As the Court knows, there are multiple respondents in this case. As a result of a coin toss, counsel for respondents WorldCom Technologies, Inc., MCI WorldCom Network Services, Inc., MCIMetro Access Transmission Services LLC, and Focal Communications Corp. (collectively, "WorldCom") was allotted the oral argument time for the private respondents in this case. As WorldCom's counsel acknowledged at oral argument yesterday, his client's position is in direct conflict with Ameritech's position on the critical issue in the case: whether the federal courts have jurisdiction to adjudicate a *claim* that a state commission has violated federal law by nullifying provisions in commission-approved section 252 interconnection agreements that expressly limit the obligations imposed by those agreements to the requirements of the 1996 Act. Ameritech vigorously disagrees with the position on this issue espoused by WorldCom's counsel at oral argument. Ameritech respectfully submits that the accompanying post-argument brief is necessary to make clear the extent of and bases for Ameritech's disagreement with the views advocated by WorldCom and that the brief would assist the Court in resolving this case.

For the foregoing reasons, the motion for leave to file the accompanying post-argument brief should be granted.

Respectfully submitted.

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